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No. _____

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., et al.,

Petitioners,

v.

ROBERT M. STEWART, et al.,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State Legislature may, by statute, designate a class of property, the ownership and use of which has been legal within the State for decades and where the State has taken specific action to require expenditures and investments to maintain that property, as illegal "contraband" and thereby avoid the constitutional duty to pay just compensation for the taking of such property even though this Court held in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)), that a " 'State, by ipse dixit, may not transform private property into public property without compensation' "?

2. Whether the court below erred in holding that reasonable investment-backed expectations are part of every takings case, even those cases in which the property owner has shown that he has been deprived of all economically beneficial use of his property?

PARTIES TO THE PROCEEDING

Petitioners Westside Quik Shop, Inc., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc. are owners and lessees of video gaming machines which they operate in convenience stores and in buildings constructed specifically for video gaming. Petitioners Westside Quik Shop, Inc. and Winner's Pot of Gold Hot Spot, Inc. are both corporations in good standing under South Carolina law and hereby declare, pursuant to Rule 29.6 of this Court, that neither of these corporations have parent companies or any wholly owned subsidiaries. Petitioners were respondents in the South Carolina Supreme Court and plaintiffs in the trial court. The respondents, Robert M. Stewart and Charles M. Condon, were petitioners in the South Carolina Supreme Court and defendants in the trial court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. The Important Constitutional Issue of How Far a State Can Go in Declaring Property "Illegal Contraband" to Avoid Constitutional Scrutiny Has Not Been Decided By This Court 10

II. By Adding a Reasonable Expectations Element To the Per Se Test Announced By This Court in *Lucas v. South Carolina Coastal Council,* the South Carolina Supreme Court Has Decided an Important Federal Constitutional Issue in Direct Conflict with Relevant Decisions of This Court and of Other Federal Courts of Appeal 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 17

Agins v. Tiberon, 447 U.S. 255 (1980) 12

Bennis v. Michigan, 516 U.S. 442 (1996) 14, 15

Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993) 16

Chioffi v. City of Winooski, 676 A.2d 786 (Vt. 1996) 19

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 18

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 95 F.3d 1422 (9th Cir. 1996) 18

Colorado Department of Health v. The Mill, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995) 10, 22

District Intown Properties Limited Partnership v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999) 22

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998) 18

Dolan v. City of Tigard, 512 U.S. 374 (1994) 13

Florida v. White, 526 U.S. 559 (1999) 15

Florida Rock Industries v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 18, 19

Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000) ... 10, 20, 21

Greater New Orleans Broadcasting v. United States, 527 U.S. 173 (1999) 16

TABLE OF AUTHORITIES – Continued

Page

Joytime Distributors & Amusement Co. v. State of South Carolina, No. 25007, 1999 WL 969280 at *1 (S.C. Oct. 14, 1999) 5

Lopes v. City of Peabody, 629 N.E.2d 1312 (Mass. 1994) 10, 19, 20

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

McQueen v. South Carolina Coastal Council, 530 S.E.2d 628 (S.C. 2000), *petition for cert. filed* (Aug. 22, 2000) 21

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 13

Ohio ex rel. Pizza v. Rezcallah, 702 N.E.2d 81 (Ohio 1998) 10, 20

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) 9, 14

Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) 10, 20

Palazzolo v. Rhode Island ex rel. Tavares, 746 A.2d 707 (R.I. 2000), *petition for cert. filed* (June 21, 2000) 21, 22

Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000) 10, 19

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 17, 20

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 13

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 12

TABLE OF AUTHORITIES – Continued

Page

Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990) 10

South Carolina v. Blackmon, 403 S.E.2d 660 (S.C. 1991) 3

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 15

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 8, 11, 12

Westside Quik Shop, Inc. v. Stewart, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000)..... *passim*

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 10

CONSTITUTIONS

U.S. CONST. amend V 2, 7, 10, 12, 14, 17

U.S. CONST. amend XIV 2, 14

S.C. CONST. art. I, § 13 7

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1491 (1988) 10

42 U.S.C. § 1983 (1999) 2, 7

Act 125, 1999 S.C. Acts 1319 ..... 5, 8, 11

S.C. Code Ann. § 16-19-60 (Law Co-op. 1999) 3

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Final Report, National Gambling Impact Study Comm'n (June 1999) 15

PETITION FOR WRIT OF CERTIORARI

Petitioners Westside Quik Shop, Inc., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc. respectfully petition this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court from which review is sought is *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000) (Appendix to Petition for Writ of Certiorari ("App.") at 1A-11A). This Court denied a motion for stay from that decision on July 6, 2000.

JURISDICTION

The South Carolina Supreme Court granted respondents' request to hear this in its original jurisdiction on June 6, 2000 (App. at 12A) and entered its decision on June 21, 2000. (App. at 1A-11A). Petitioners' applications for stay from the decision below were denied by the South Carolina Supreme Court on June 30, 2000 and by this Court on July 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> "No person . . . shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. CONST. amend. V.

The Fourteenth Amendment to the United States Constitution provides:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

U.S. CONST. amend. XIV.

42 U.S.C. § 1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation . . . subjects, causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

42 U.S.C. § 1983 (1999).

STATEMENT OF THE CASE

Since their invention in the mid-1970s, video gaming machines have been legal in South Carolina. Although

possession and use of many other types of gambling devices is not permitted, in 1975 the state legislature specifically exempted video gaming devices from that prohibition. *See* S.C. Code Ann. § 16-19-60 (Law Co-op. 1999).[1] Under South Carolina law, the use of these video machines for gambling was entirely lawful, provided the payouts were made by a human attendant rather than by the machine itself. *South Carolina v. Blackmon*, 403 S.E.2d 660 (S.C. 1991). In consequence, plaintiffs and many other businesses invested substantial sums over the years to purchase video gaming machines, and to build businesses and buildings where they were lawfully used and housed.

A typical example is plaintiff Westside Quik Shop, Inc. In 1978, Ronnie White and Michael Wright leased an abandoned gas station in Greenville, South Carolina, and, for $15,000, converted it into one of the town's first convenience stores. Affidavit of Ronald James White at ¶ 4 (App. at 40A). They incorporated their business the next year as plaintiff Westside Quik Shop, Inc. (hereinafter "Westside") and in 1981, bought the gas station and land on which it stood. *Id.* at ¶¶ 1, 5 (App. at 39A-41A). For the past 22 years, the business has supported the Wright and White families, while providing a neighborhood market for residents of the community, many of whom lack transportation to get to supermarkets and shopping malls. *Id.* at ¶ 4 (App. at 40A). In 1997, Westside purchased a second Greenville convenience store, Dave's

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[1] The opinion below erroneously stated that this legislation was enacted in 1982. *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000) (App. at 2A).

Grocery. *Id.* at ¶ 9 (App. at 42A). Neither of these stores makes a profit on food and gasoline; they are economically viable only because of the five video poker machines at the original Westside location and the three located at Dave's. *Id.* at ¶¶ 5, 10 (App. at 40A-41A, 42A-43A); *see also* Affidavit of Gary Clardy (App. at 32A-35A). As Mr. White states: "Few of our customers spend more than a couple of dollars on the machines when they come in to purchase goods, but it all adds up to provide a profit on a business that would otherwise lose money." *Id.* at ¶ 5 (App. at 40A-41A).

Westside placed its first few video poker machines in its original Greenville store in 1981. *Id.* (App. at 40A-41A). Over the years, Westside acquired various machines, licensing them and operating them in full conformity with South Carolina law. *Id.* at ¶¶ 5, 6, 9 (App. at 40A-41A, 42A). Then, in 1998, the State announced that it would require all such machines to be electronically connected by modem to a central state computer, requiring Westside to purchase all new machines with this computer-age technology. *Id.* at ¶ 11 (App. at 43A). As a result, within the last two years Westside has invested $144,000 in the purchase of 18 machines (and has paid an additional $80,000 in license fees). *Id.* at ¶¶ 11, 12 (App. at 43A). Mr. White testified that Westside made this investment in new machines with borrowed money, and only after a 1994 county-wide referendum in which Greenville County voted to continue to allow video poker in the community. *Id.* at ¶¶ 7, 8, 11 (App. at 41A-42A).

Similarly, plaintiffs Phelix and Ree Byrd had been in the video gaming business since 1992. Affidavit of Phelix C. Byrd at ¶ 5 (App. at 14A). In 1998, they incorporated

their business as plaintiff Winner's Pot of Gold Hot Spot, Inc. (hereinafter "Winner's"), which until July 1 operated four video gaming venues. *Id.* at ¶¶ 6, 8 (App. at 15A). About a year ago, Mr. and Mrs. Byrd completed construction of two single-purpose buildings to accommodate their business, at a total cost of over $1.3 million. *Id.* at ¶¶ 11, 12 (App. at 16A-17A). They also renovated two leased properties, at a total cost of $120,000, and have several years left to run on the two leases. *Id.* at ¶ 13 (App. at 17A). Until July 1 of this year, when video gaming became illegal, Winner's employed 80 people, with a payroll of $20,000 per week, including Mr. and Mrs. Byrd themselves. *Id.* at ¶ 7 (App. at 15A). Since video gaming was their only source of income, the corporation and Mr. and Mrs. Byrd have been entirely wiped out by respondents' closure of their business under Act 125, and their buildings sit idle and useless.[2] *See* Affidavit of A. Crawford Clarkson (App. at 29A-31A); Affidavit of Fred Seale (App. at 36A-38A).

On July 1, 1999 the South Carolina legislature passed Act 125, reclassifying video gaming machines such as plaintiffs' as illegal contraband effective July 1, 2000.[3] Act

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[2] Although their business was profitable during 1999, most of those profits went into construction of the two buildings.

[3] To be more precise, the legislature sought to put the issue before the electorate as a referendum, but the court below struck down the referendum process as an unlawful delegation of the lawmaking power to the electorate, then went on to determine that the remainder of the statute outlawed video gaming. *See Joytime Distributors & Amusement Co. v. State of South Carolina*, No. 25007, 1999 WL 969280 at *1 (S.C. Oct. 14, 1999), *cert. denied*, 120 S. Ct. 1719 (2000).

125, 1999 S.C. Acts 1319. As respondent, South Carolina Attorney General Condon, announced:

> Just after the stroke of midnight June 30, 2000, a video gambling machine will be no different in terms of its illegality than a kilo of cocaine. . . . Therefore, as of July 1, these machines will be contraband, subject to confiscation and destruction and their possession will be a criminal offense, subject to arrest and prosecution. . . . [4]

Letter from Charles M. Condon to Robert M. Stewart at 7 (May 8, 2000).

On May 25, 2000, petitioners filed an action in the Common Pleas Court for Greenville County, South Carolina, Thirteenth Judicial Circuit, seeking a temporary injunction (together with permanent injunctive and declaratory relief) against the enforcement of Act 125, set to take effect on June 30, 2000. Petitioners alleged that the application of Act 125 would result in the taking of their

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[4] The Condon letter also stated:

> With respect to the criminal aspect of § 12-21-2710, the statute makes it 'unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State' video gambling machines as of July 1, 2000. . . . Thus, anyone possessing the illegal video gambling machines on or after July 1, 2000 would be subject to criminal prosecution pursuant to § 12-21-2710.

Letter from Charles M. Condon to Robert M. Stewart at 5 (May 8, 2000).

private property rights in violation of the Just Compensation Clauses of the Fifth Amendment and Article I, Section 13 of the South Carolina Constitution and would also violate 42 U.S.C. § 1983.

Instead of answering the complaint, the next day respondents petitioned the Supreme Court of South Carolina to remove the case to that court's original jurisdiction and on June 6, 2000, the removal petition was granted over petitioners' strenuous objections. By its June 6, 2000 Order, the South Carolina Supreme Court required the parties to file opening briefs on June 12, 2000, and reply briefs on June 16, 2000. The case was submitted for decision on June 20, 2000, and on the next morning, June 21, 2000, the South Carolina Supreme Court issued its decision in *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *1 (S.C. June 21, 2000) (App. at 1A-11A), finding against petitioners' application for a temporary injunction and rendering a decision on the merits of petitioners' underlying lawsuit without any hearing or any notice to petitioners that the merits of the lawsuit were to be decided.

On June 30, 2000, petitioners submitted an Emergency Motion for Stay to the court below, pending review by this Court, and on the same day, the South Carolina Supreme Court issued an Order denying the stay application. On July 5, 2000, petitioners sought a stay from this Court that was denied on July 6, 2000.

The facts of this case, as presented for review by this Court, are pristine and unchallenged. Since respondents never filed an Answer to the Complaint nor any affidavit, the only facts in the record are the allegations of the

Complaint and the sworn testimony in affidavits submitted by plaintiffs. Hence, the case presents a stark issue of law, unencumbered by any factual dispute. Those uncontroverted facts establish that Act 125 as applied to petitioners has resulted in a total taking of their property rights by shutting down their businesses, forfeiting their video gaming machines, and destroying all beneficial and productive use of their real property.

REASONS FOR GRANTING THE WRIT

The South Carolina Supreme Court has made numerous significant rulings which are in error and which have broad implications for the stability of property ownership. First, the court's refusal to enjoin the State's destruction of petitioners' property rights without payment of just compensation, holding that state legislatures can simply declare a currently disfavored class of property to be illegal contraband and subject to public confiscation without payment of just compensation, presents an important core constitutional issue that has yet to be resolved by this Court. On the one hand, this Court has repeatedly observed that a " 'State, by ipse dixit, may not transform private property into public property without compensation.' " *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). On the other hand, this Court has established that where the property is such that "the possession of which, without more, constitutes a crime" such as adulterated food, sawed-off shotguns, narcotics, and smuggled goods, such classes of property can be seized without triggering the

duty to pay just compensation. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

This case lies in the middle and is particularly troublesome because it involves a class of property that has been historically encouraged by the State (by specific legislative authority, subsequently approved by the South Carolina Supreme Court), but is now disfavored because of a change in public policy. If left unreviewed, the court's holding that a State can simply declare certain classes of property "contraband" and not require payment of just compensation could have serious consequences for the continued integrity of the Just Compensation Clause. Second, the court below held that "even where [the property owner] is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000) (App. at 10A).

The opinion below ignores this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), holding that when all beneficial use of property is taken, a taking has occurred: "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019. The *Westside* decision also conflicts with decisions of other state courts and federal courts of appeals, notably the Federal Circuit Court of Appeals, which have held

that the taking of all economically beneficial use of property is a per se violation of the Fifth Amendment. *See Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000); *Ohio ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81 (Ohio 1998); *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994); *but see Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000); *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996); *Colorado Department of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995). That conflict among state courts[5] and among the courts of appeals on a question of federal constitutional law warrants resolution by this Court.

I. The Important Constitutional Issue of How Far a State Can Go in Declaring Property "Illegal Contraband" to Avoid Constitutional Scrutiny Has Not Been Decided By This Court.

This case affords this Court the opportunity to determine when and under what circumstances a State may

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[5] Under decisions of this Court, all federal takings claims involving the state must first be resolved by a state court. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). Under the Tucker Act, 28 U.S.C. § 1491 (1988), all takings claims for money damages against the United States must go to the U.S. Court of Federal Claims and on appeal to the Federal Circuit Court of Appeals. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). Thus, the conflicts present among state courts and the Federal Circuit Court of Appeal are important because they signify a split of authority in the only forum with jurisdiction to hear these constitutional claims.

deem property "contraband" outside the protections of the Constitution and when such property is entitled to constitutional protection, including protection against uncompensated takings. Even though petitioners' video gaming machines had always been completely legal in South Carolina, and not historically considered illegal contraband within the State, the court below ruled that a State legislature may avoid the constitutional requirement of just compensation by the simple expedient of declaring the property to be "contraband" and requiring uncompensated forfeiture of the property to the State:

> Act No. 125 amends § 12-21-2710 to include the video gaming machines in question which will become subject to forfeiture under § 12-21-2712 as of July 1, 2000. We have already determined that the forfeiture of gaming machines pursuant to these statutes accords with due process requirements. We see no reason to answer this question differently where the forfeiture applies to video gaming machines that until recently were not contraband.

Westside Quik Shop, Inc. v. Stewart, No. 25158, 2000 WL 823346 at *2 (S.C. June 21, 2000) (citations omitted) (App. at 6A-7A).

This holding of the court below conflicts irreconcilably with the holdings of this Court that property rights under the Fifth Amendment are "defined by background principles of law such as state law," (*see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)), and may not be defined away by legislative enactment alone:

> We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common law maxim such as sic utere tuo ut alienum non laedas. As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation."

Lucas, 505 U.S. at 1031 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167-72 (1998) (holding interest on deposits in court or attorney's trust account may not be declared public property ipse dixit). Moreover, the court below created an unprecedented exception to the just compensation guarantee of the Fifth Amendment by holding that the "sacrifice" (i.e., uncompensated taking of private property rights) of property rights may be required if the State legislature deems it in the public interest: "In determining whether the forfeiture of a particular type of property violates due process, we consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power."[6] *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *2 (S.C. June 21, 2000) (App. at 7A).

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[6] Later in the opinion, the court below misstated the rule of *Agins v. Tiberon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."), as follows: "if the regulation does not deny the owner all economically viable use of his land, it does not constitute a taking if it substantially advances legitimate government

That holding is hopelessly inconsistent with the long line of Fifth Amendment cases decided by this Court. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987) ("The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization."); *Dolan v. City of Tigard*, 512 U.S. 374, 390-92 (1994) (holding that exactions must be "roughly proportional" to the burden created by the activity).

Indeed, the holding in the instant case flies in the face of this Court's rebuff of an identical effort by the court below to eviscerate the Just Compensation Clause's protection: "The South Carolina Supreme Court's approach would essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this. . . . " *Lucas*, 505 U.S. at 1026. In short, the legislative label of "contraband," just like the legislative label of "nuisance," should not automatically cancel the rights guaranteed by the just compensation clause of the Fifth Amendment.

At the same time, a separate line of cases has developed the rule that the requirements of the Just Compensation Clause do not apply where the property in

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interests." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *3 (S.C. June 21, 2000) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)) (App. at 10A).

question is classified as "contraband" subject to forfeiture. As this Court has explained, where "objects the possession of which, without more, constitutes a crime [e.g., adulterated food, sawed-off shotguns, narcotics, and smuggled goods], the government has an obvious remedial interest in removing the items from private circulation, however blameless or unknowing their owners may be." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965). Applying this rule of contraband, this Court rejected a wife's claim that forfeiture of her one-half interest in the family automobile, which her husband had used for immoral purposes, was not an unconstitutional taking:

> Petitioner also claims that the forfeiture proceeding here in question was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.

Bennis v. Michigan, 516 U.S. 442, 452-53 (1996), *rehearing denied*, 517 U.S. 1163 (1996).

However, the facility with which a state legislature may evade constitutional protections by the mere expedient of labeling a class of property "contraband," or an

activity involving that property a "vice," has raised concerns among members of this Court. For example, in *Florida v. White*, 526 U.S. 559 (1999), Justice Souter, writing for himself and Justice Breyer, stated:

> I join the Court's opinion subject to a qualification against reading our holding as a general endorsement of warrantless seizures of anything a State chooses to call 'contraband,' whether or not the property happens to be in public when seized. The Fourth Amendment does not concede any talismanic significance to use of the term 'contraband' whenever a legislature may resort to a novel forfeiture sanction in the interest of law enforcement, as legislatures are evincing increasing ingenuity in doing.

Id. at 566-67 (citing *Bennis v. Michigan*, 516 U.S. 442, 458 (1996) (Stevens, J., dissenting); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 81-82 and n.1 (1993) (Thomas, J., concurring in part and dissenting in part) ("In my view, . . . the Court . . . has not always placed sufficient stress upon the protection of individuals' traditional rights in real property . . . [a]nd like the majority, I am disturbed by the breadth of new civil forfeiture statutes.")).

Moreover, as gambling becomes an increasingly popular entertainment in the United States,[7] the extent to

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[7] In 1998, 29% of Americans gambled at casinos at some time, 52% played a lottery, 6% gambled on bingo, and 7% bet on horses. Final Report, National Gambling Impact Study Comm'n at 1-3 & Fig. 1-2 (June 1999). In sum, 125 million Americans gambled in 1998. *Id.* at Appendix I (Personal Statement of Leo T. McCarthy). As of the date of the Commission's report, a total of

which owners of gaming machines and businesses enjoy the protections of the Bill of Rights takes on added significance.[8] As this Court recently stated in holding that liquor retailers are entitled to First Amendment protection:

> The scope of any 'vice' exception to the protection afforded by the First Amendment would be difficult, if not impossible to define. Almost any product that poses some threat to public health or public morals might reasonably be characterized by a state legislature as relating to 'vice activity.' Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be purchased on the open market. The recognition of such an exception would also have the unfortunate consequence of either allowing state legislatures to justify censorship by the simple expedient of placing the 'vice'

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37 states had state-sponsored lotteries (including the District) and lotteries were the most widespread form of gambling in the United States. *Id.* at 2-1. At least seven states had legalized the operation of video poker machines as of the date of the report while 28 states had legally operating casinos. *Id.* at 2-4 – 2-6. Wagering on horse racing was reported legal in 43 states, and 15 states had operating, legal greyhound tracks. *Id.* at 2-11.

[8] This Court has recently underscored the mainstream acceptance of the gaming industry, stating: "Some form of gambling is legal in nearly every State." *Greater New Orleans Broadcasting v. United States*, 527 U.S. 173, 187 n.5 (1999). Indeed, the South Carolina Supreme Court has also recognized that gambling has roots in the customs and mores of South Carolina by finding that, since 1712 (even before the colony became a State in 1788), "gambling in some form has not always been illegal" in South Carolina. *Berkebile v. Outen*, 426 S.E.2d 760, 762 (S.C. 1993).

> label on selected lawful activities, or requiring the federal courts to establish a federal common law of vice.

44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484, 514 (1996). This case, thus, squarely poses the parallel question: Does the Fifth Amendment contain a "vice exception" for gaming machines and businesses?

II. By Adding a Reasonable Expectations Element To the Per Se Test Announced By This Court in *Lucas v. South Carolina Coastal Council*, the South Carolina Supreme Court Has Decided an Important Federal Constitutional Issue in Direct Conflict with Relevant Decisions of This Court and of Other Federal Courts of Appeal.

In 1992, this Court held that a per se taking had occurred when a property owner had been deprived of all beneficial and productive use of his property and a court need not engage in the three-factor analysis set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), for determining whether an unconstitutional taking had occurred: "When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). The court below held in this case, however, that it is free to ignore this per se test and to consider one of the *Penn Central* three factors that this Court previously held was irrelevant when a property owner has been denied all use of his property. That is to say, the court below flatly rejected this Court's holding in

Lucas by stating: "Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000) (App. at 10A).

Following the *Lucas* decision, two distinct lines of cases have developed. Consistent with *Lucas*, numerous courts have adopted a categorical rule of liability holding that when the property owner has been deprived of all beneficial and productive use of his property, liability for a taking has been established. The integrity of the *Lucas* per se rule was confirmed last term when this Court upheld a Ninth Circuit decision awarding just compensation for the taking of all economically viable use of the landowners' property. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In *Del Monte Dunes*, the Ninth Circuit explained that "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use.' " *Del Monte Dunes*, 95 F.3d 1422, 1432 (9th Cir. 1996); *see also Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) ("In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically beneficial use of land, and no balancing of other factors commonly analyzed in takings law – reasonable investment-backed expectations and legitimate government interest – would be necessary.").

In *Florida Rock Industries v. United States*, 18 F.3d 1560, 1569 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), the U.S. Court of Appeals for the Federal Circuit suggested

that the *Lucas* per se test applies even when there is less than a total taking. In *Florida Rock*, there was a 95 percent diminution of value. The *Florida Rock* Court stated further that in a takings case, the court must resolve two preliminary questions: "whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking . . . to occur," and "how to determine, in any given case, what that proportion is." *Id.* at 1568; *see also Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1379 (Fed. Cir. 2000), *petition for rehearing or rehearing en banc filed* (May 26, 2000) ("[W]hen . . . the regulatory imposition has deprived the owner of all economically viable use of his property (a 'categorical taking'), then the only remaining issue is the Government's defense under . . . state property law . . . [or] . . . the common law nuisance doctrine.").

In *Chioffi v. City of Winooski*, 676 A.2d 786 (Vt. 1996), the Vermont Supreme Court held that even though the property owner may not have had reasonable investment-backed expectations for use of his building after it had been destroyed by a fire, he could still be entitled to just compensation if he could show that all economically beneficial use of his land had been also destroyed: "[a]ny expectation of a three-unit residential development was no longer 'reasonable,' . . . only the total denial of all economically beneficial use would, under the circumstances, create a taking." *Id.* at 790 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 n.7 (1992)).

Likewise, in *Lopes v. City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), the Massachusetts Supreme Court held that "[i]f the judge concludes that the zoning regulation deprives the parcel of all economically beneficial use, the

Lucas opinion advises us that there is a categorical regulatory taking. . . . " *Id.* at 1316. Finally, in *Ohio ex rel. Pizza v. Rezcallah*, 702 N.E.2d 81, 93 (Ohio 1998), the Ohio Supreme Court held that the mandatory locking of a storehouse that precluded the owners from making any use of the storehouse for that period of time was a per se violation of the Just Compensation Clause.

In sharp contrast, numerous courts, including the court below, have not followed the *Lucas* rule and have held that even when a regulation deprives a property owner of all use of his property, the property owner must satisfy the reasonable, investment-backed expectations prong of the *Penn Central* test. The leading case for the establishment of the anti-*Lucas* rule, and relied on by the court below, is *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000). In *Good*, the U.S. Court of Appeals for the Federal Circuit held that the owner of 40 acres of undeveloped land in Florida was not entitled to just compensation for the taking of all beneficial and productive use of his property by virtue of his being denied a Section 404 permit. The Federal Circuit held that just compensation was not warranted in that case where because of "the growing consciousness of and sensitivity toward environmental issues," the landowner should have foreseen that "the regulatory climate" would bar any future use of his property, even though the landowner had acquired the land prior to enactment of the statute that barred his current proposed use. *Id.* at 1361, 1363;[9] *see also Outdoor Graphics, Inc. v. City of Burlington*,

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[9] Without taking any evidence on the issue and in direct contradiction to the affidavits filed by petitioners proving their

103 F.3d 690 (8th Cir. 1996) (rejecting takings claim on the ground that the property owner knew that the regulatory program in place precluded use of the property).

The *Good* rule has been followed by three courts of last resort at the State level and the Federal District Court for the District of Columbia. Not only has the Supreme Court of South Carolina followed the *Good* rule in this case, but it also followed it in *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), *petition for cert. filed* (Aug. 22, 2000). In *McQueen*, the landowner was denied two coastal permits which resulted in his being foreclosed from any beneficial and productive use of his land. *Id.* at 629-30. The South Carolina Supreme Court nevertheless held that he was not entitled to just compensation because his beachfront property had been the subject of at least some developmental regulation for over a century. *Id.* at 630-35. The court concluded that the landowner had thus demonstrated a "distinct lack of investment-backed expectations" to warrant just compensation. *Id.* at 635.

In *Palazzolo v. Rhode Island ex rel. Tavares*, 746 A.2d 707 (R.I. 2000), *petition for cert. filed* (June 21, 2000), the landowner sought just compensation for the taking of his land from the Rhode Island Coastal Resources Management

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legitimate expectations that video gaming would continue to be lawful and profitable in South Carolina, the court below made the finding that: "Where, as here, the regulatory climate renders an owner's investment-backed expectations unreasonable, no taking will be found." *Westside Quik Shop, Inc. v. Stewart*, No. 25158, 2000 WL 823346 at *4 (S.C. June 21, 2000) (citing *Good v. United States*, 189 F.3d 1355, 1362-63 (Fed. Cir. 1999) (App. at 10A).

Council (CRMC). The Rhode Island Supreme Court held that the landowner was not entitled to just compensation because: "At that time, there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision." *Id.* at 717. In *Colorado Dept. of Health v. The Mill*, 887 P.2d 993 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995), the Colorado Supreme Court held that there was no unconstitutional taking of the owners' property because the owners lacked a reasonable expectation that they could use the property in the manner they intended.

Finally, in *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), *petition for cert. filed* (April 17, 2000), the landowner sought just compensation for the taking of his land following denial of permits to construct townhouses in the District of Columbia. The United States District Court of the District of Columbia held that the landowner was not entitled to just compensation because "[the landowner] purchased and subdivided its property subject to an existing regulatory scheme that establishes that [the landowner] could have had no reasonable expectations of development at the time it made its investments." *Id.* at 883.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 19, 2000

WESTSIDE QUIK SHOP, INC., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc., Plaintiffs,

v.

Robert M. STEWART, Sr., in his official capacity as Chief of the State Law Enforcement Division; and Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, Defendants.

No. 25158.

Supreme Court of South Carolina.

Submitted June 20, 2000.

Decided June 21, 2000.

George M. Hearn, Jr., of Hearn, Brittain & Martin, P.A., of Conway; John L. Napier, of Winston & Strawn, of Washington, D.C.; and Roger J. Marzulla and Nancie G. Marzulla, both of Marzulla & Marzulla, of Washington, D.C., for plaintiffs.

Attorney General Charles M. Condon, Assistant Deputy Attorney General Robert D. Cook, Assistant Deputy Attorney General J. Emory Smith, Jr., Senior Assistant Attorney General Nathan Kaminski, Jr., Assistant Attorney General Christie Newman Barrett, and Richard H. Seamon, of University of South Carolina School of Law, all of Columbia, for defendants.

IN THE ORIGINAL JURISDICTION

MOORE, J.

Plaintiffs are the owners and lessees of video gaming machines used for profit in their places of business. On May 25, 2000, plaintiffs filed this action in circuit court

challenging the constitutionality of 1999 S.C.Act No. 125 which, among other things, makes possession of these machines illegal as of July 1, 2000. Plaintiffs seek an injunction against enforcement of the Act claiming it effects an unconstitutional taking of their property without just compensation.

Because of the great public interest in finally determining this matter, we accepted the case in our original jurisdiction and ordered expedited briefing. Having considered the extensive briefs of the parties, we hold compensation is not constitutionally required under either our Federal or State Constitutions. Accordingly, we deny the injunction.

BACKGROUND

For nearly seventy years, gaming machines have been illegal in this State and subject to forfeiture as contraband. In 1931, the General Assembly enacted a comprehensive statute outlawing the possession of all forms of gambling devices, including vending machines that could be operated as gambling devices. 1931 S.C.Act No. 368.[1] In 1982, however, the General Assembly enacted an exemption for "video games with free play feature" which were a relatively recent technological development. 1982 S.C.Act No. 466.[2] In *State v. Blackmon*,

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[1] Codified as 1932 Code of Laws § 1301-A.

[2] Codified as S.C.Code Ann. § 52-15-10 and subsequently recodified as § 12-21-2710. In 1997, this section was amended to limit the exemption for video games to those "which meet the technical requirements provided for in Section 12-21-2782 and Section 12-21-2783." 1997 S.C.Act No. 155, Pt. II, § 54(B).

304 S.C. 270, 403 S.E.2d 660 (1991), we held nonmachine cash payouts from these video gaming machines were legal under a pre-existing statute, S.C.Code Ann. § 16-19-60 (Supp.1999).[3]

In the ensuing years, our State witnessed the dramatic growth of video gaming into a multi-billion dollar industry that became the subject of much public debate. Despite the repeated introduction of legislation aimed at repealing the exemption for video gaming machines,[4] no legislation was passed until 1993. In July of that year, the General Assembly provided for local option referenda to be held on a county by county basis to determine whether nonmachine cash payouts for video gaming should become illegal. 1993 S.C.Act No. 164, Pt. II, § 19H. In November 1994, twelve counties voted in favor of making such payouts illegal. The local option referenda, however, were ultimately struck down by this Court in 1996 as unconstitutional special legislation. *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996). Cash payouts once again became legal throughout the State.

In November 1998, this Court upheld the statutory scheme regulating video gaming machines against a challenge that this type of gaming device constituted an

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[3] Repealed effective July 1, 2000, by 1999 S.C.Act No. 125, Pt. I, § 8.

[4] *See, e.g.*, H.R.3823, 108th Leg., 2d Sess. (1989) (bill to repeal § 16-19-60); H.R.3867, 108th Leg., 2d Sess. (1989) (bill to make it unlawful to have or to operate a machine for playing games which utilize a deck of cards); H.R.3104, 109th Leg., 1st Sess. (1991) (bill to repeal § 16-19-60).

unconstitutional lottery. *Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 508 S.E.2d 575 (1998).

Finally, in an extra session called by the Governor in June 1999, the General Assembly enacted 1999 S.C.Act No. 125 providing for a November referendum to be held statewide to decide the fate of video gaming. Voters would be asked whether cash payouts for video gaming machines should continue to be allowed after June 30, 2000. If voters answered "no," Part I of the Act would become effective July 1, 2000. This part of the Act repeals § 16-19-60, which allows nonmachine cash payouts, and amends S.C.Code Ann. § 12-21-2710 (2000) to remove the exemption for video gaming machines, thereby rendering the possession or operation of these machines illegal.[5] Further, under S.C.Code Ann. § 12-21-2712 (2000), these machines are then subject to forfeiture and destruction by the State.[6]

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[5] Section 12-21-2710, as amended effective July 1, 2000, provides in part:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value. . . .

[6] Section 12-21-2712, as amended effective July 1, 2000, provides:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section

Before the referendum was held, an action was brought challenging its constitutionality. After taking the case in our original jurisdiction, in October 1999, this Court struck down the referendum but severed it from the remaining parts of the Act. Specifically, we found Part I, which bans the possession or operation of these machines, to be a free standing legislative enactment and therefore valid. *Joytime Distrib. and Amusement Co. v. State*, Op. No. 25007 (S.C.Sup.Ct. filed October 14, 1999) (Shearouse Adv.Sh. No. 32 at 10). Accordingly, on July 1, under §§ 12-21-2710 and -2712, these machines will become contraband subject to forfeiture and destruction regardless of their use or operability. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000).

More than seven months after our decision in *Joytime* and less than six weeks before the impending ban will go into effect, plaintiffs commenced this action.

ISSUES

I. Are plaintiffs entitled to compensation for the forfeiture of their video gaming machines?

II. Are plaintiffs entitled to compensation for their loss of business?

III. Are plaintiffs entitled to compensation for the real property upon which their businesses are located?

12-21-2710 or any other law of this State, direct that it be immediately destroyed.

DISCUSSION

I.

Plaintiffs contend Act. No. 125 should be enjoined because it effects a taking of their video gaming machines without compensation. We find plaintiffs are entitled to no compensation because their machines are lawfully subject to forfeiture as contraband.

The forfeiture of contraband that comports with the Fourteenth Amendment's Due Process Clause[7] is not a compensable taking under the Takings Clause of the Fifth Amendment.[8] *Bennis v. Michigan*, 516 U.S. 442, 452 (1996); *see also United States v. $7,990.00 in U.S. Currency*, 170 F.3d 843 (8th Cir.1999). Nor is it a compensable taking under the corresponding provision of our State Constitution, article I, § 13. *Myers v. Real Property at 1518 Holmes Street*, 306 S.C. 232, 411 S.E.2d 209 (1991).

Under § 12-21-2712, gaming machines that are operated or possessed in violation of § 12-21-2710 are subject to forfeiture as contraband per se. *192 Coin-Operated Video Game Machines, supra*. Act No. 125 amends § 12-21-2710 to include the video gaming machines in question which will become subject to forfeiture under § 12-21-2712 as of July 1, 2000. We have already determined that the forfeiture of gaming machines pursuant to these statutes

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[7] "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const., Amend. XIV, § 1.

[8] "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. V.

accords with due process requirements. *Id.*[9] We see no reason to answer this question differently where the forfeiture applies to video gaming machines that until recently were not contraband.

In determining whether the forfeiture of a particular type of property violates due process, we consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. *See Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705 (1897); *Peoples Program for Endangered Species v. Sexton*, 323 S.C. 526, 529, 476 S.E.2d 477, 479 (1996). Gamingdevices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture, *Lawton v. Steele*, 152 U.S. 133, 136 (1894), and we have consistently deferred to the legislature's determination of what gaming devices must be sacrificed for the public welfare. *See, e.g., Johnson v. Collins Entertainment Co., supra.* Further, we have acknowledged the difficulty of enforcing statutes prohibiting gaming. *State v. Kizer*, 164 S.C. 383, 162 S.E. 444 (1932), overruled on other grounds, *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). As the United States Supreme Court has observed, forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable. *Bennis*, 516 U.S. at 452 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)). We

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[9] We construed § 12-21-2712 to include an opportunity for the owner to contest the magistrate's determination of illegality. *Id.* at 16.

conclude the forfeiture of gaming machines pursuant to §§ 12-21-2710 and -2712 comports with due process even when applied to machines that were previously lawfully possessed.

Further, we note there will have been a lapse of more than eight months from the time Part I of Act No. 125 became law by decision of this Court in October 1999 and the date it becomes enforceable on July 1, 2000. During this time, plaintiffs owning video gaming machines have been free to profitably dispose of them out of state. These plaintiffs have had a reasonable period of time to avoid any forfeiture of their property and cannot claim a compensable taking. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (finding no taking under War-Time Prohibition Act which prohibited sale of liquor but allowed a period of seven months and nine days to dispose of stored liquor).

We find the forfeiture of plaintiffs' video gaming machines, or their leasehold interest in these machines, is not a compensable taking under either our Federal or State Constitutions.

II.

Plaintiffs claim the forfeiture of their video gaming machines effects a taking of their businesses.

It has long been settled that injury to a business dependent on confiscated property is not compensable under the Fifth Amendment. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *Mitchell v. United States*, 267 U.S. 341 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S.

668 (1923); *cf. Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949) (where government has taken business for continued operation by government entity, Fifth Amendment requires compensation for going-concern value); *see also United States v. 57.09 Acres of Land*, 757 F.2d 1025 (9th Cir.1985); *Hooten v. United States*, 405 F.2d 1167 (5th Cir.1969); *United States v. Becktold Co.*, 129 F.2d 473 (8th Cir.1942); *cf. Yachts America, Inc. v. United States*, 779 F.2d 656 (Fed.Cir.1985) (destruction of business not compensable as separate element although value of business may be indirectly considered in valuation of land). The Fifth Amendment Takings Clause concerns itself solely with the owner's relation to the physical thing and not with consequential damages. *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Collateral damages, which include lost business profits and goodwill, are not recoverable on a federal takings claim. *Id.*; *Mibbs v. South Carolina Dep't of Revenue*, 337 S.C. 601, 524 S.E.2d 626 (1999); *Carolina Power & Light Co. v. Copeland*, 258 S.C. 206, 188 S.E.2d 188 (1972).

We apply this same analysis to the takings claim under our State Constitution and find no taking of plaintiffs' businesses under either constitution.

III.

Plaintiffs claim the forfeiture of their video gaming machines effects a taking of the real property upon which their businesses are located.

To the extent § 12-21-2710 may be considered a land use regulation, we consider its economic impact, its interference with reasonable investment- backed expectations,

and the character of the governmental action in determining whether there has been a regulatory taking. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Although plaintiffs assert their real property is well-suited in location and configuration only to the video gaming business, they cannot tenably claim it will have absolutely no economic value if no longer used to house video gaming operations. Further, if the regulation does not deny the owner all economically viable use of his land, it does not constitute a taking if it substantially advances legitimate government interests. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). As discussed above, we find the forfeiture of video gaming machines does substantially advance legitimate government interests in prohibiting illicit gaming.

Moreover, even where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking. *Good v. United States*, 189 F.3d 1355 (Fed.Cir.1999); *McQueen v. South Carolina Coastal Council*, Op. No. 25108 (S.C.Sup.Ct. filed April 17, 2000) (Shearouse Adv.Sh. No. 15 at 1). A property owner operating in a highly regulated field cannot assert a reasonable expectation that government regulation will not be altered to his detriment. *Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986). Where, as here, the regulatory climate renders an owner's investment-backed expectations unreasonable, no taking will be found. *Good*, 189 F.3d at 1362-63 (finding that in light of growing public consciousness and sensitivity on issue, owner must have been aware that the

standards and conditions governing the issuance of permits could change to his detriment).

We apply this same analysis to the takings claim under our State Constitution and conclude plaintiffs have established no taking of their real property under either constitution.

CONCLUSION

Because we find plaintiffs' takings claims to be without merit, we refuse to enjoin the enforcement of Part I of Act No. 125. Further, we summarily dispose of plaintiffs' 42 U.S.C. § 1983 cause of action. *See Brown v. Evatt*, 322 S.C. 189, 470 S.E.2d 848 (1996) (§ 1983 cause of action fails where no constitutional deprivation).

INJUNCTION DENIED.

TOAL, C.J., BURNETT, PLEICONES, JJ., and Acting Justice JAMES W. JOHNSON, JR., concur.

THE SUPREME COURT OF
SOUTH CAROLINA

Westside Quik Shop, Inc., Phelix C. Byrd, Ree M. Byrd, and Winner's Pot of Gold Hot Spot, Inc. — Respondents

v.

Robert M. Stewart, in his official capacity as Chief of the State Law Enforcement Division; Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina, — Petitioners

ORDER

Petitioners ask to remove this matter from the circuit court for this Court to hear it in our original jurisdiction and for an expedited briefing schedule. Respondents oppose the petition.

The requests are granted. Pursuant to Rule 229, SCACR, the parties shall serve and file briefs addressing the questions of law involved in this matter and copies of the items they seek to have included in the record by June 12, 2000. Thereafter, the parties may file any objections to the items the other parties seek to include in the record and may serve and file reply briefs by June 16, 2000. All materials shall be served on the opposing parties and filed with the Clerk of the Court no later than 5:00 p.m. on the due date.

IT IS SO ORDERED.

Columbia, South Carolina, June 6, 2000.

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

C.A. NO.: 2000-CP-23-

WESTSIDE QUIK SHOP, INC., PHELIX C. BYRD, REE M. BYRD, AND WINNER'S POT OF GOLD HOT SPOT, INC.

Plaintiffs,

v.

ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina,

Defendants.

AFFIDAVIT OF PHELIX C. BYRD

I, Phelix C. Byrd, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify:

1. I am 53 years old and reside at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550, Darlington County, with my wife, Ree M. Byrd. I am a registered voter in Darlington County.

2. I have two sons, Carrigan Byrd, Jr. and Braudy Jonathan Byrd. Jonathan was recently married and lives

in our home with his wife, Janie Moore Byrd. Jonathan works with my wife and me in our video poker business and his and Janie's sole income is derived from our video poker business.

3. In the mid-1960s, I joined the South Carolina National Guard and took the only position then available, as a cook. I served in that position for 14 years until I entered the Officers' Candidate School in 1976. In 1978, I received my commission from the OCS and served in the Guard as an officer for 21 years. In 1989, I retired from the Guard as a Major.

4. I have an associate degree in Industrial Engineering, which I received in 1970 from Florence-Darlington Technical College. Before entering into the gaming business in the 1970's, I held positions in several businesses, including a paper manufacturing plant and an electronics firm. Since the late-1970s, I have also run bingo operations for various charitable organizations, including the Cheraw Academy in Chesterfield County, and the Church of Lord Jesus Christ, and the Union Baptist Church, both of which are located in Darlington, South Carolina.

5. In 1992, after my bingo operations became unprofitable, my wife and I entered into the video poker industry by leasing 15 draw poker machines from Tim's Amusement (formerly Harrison King Music Company). According to a written lease agreement, we split the income received from the video poker machines on a 50%-50% basis; Tim's Amusement received 50% of the income from the machines and we received the other 50%.

6. On July 6, 1998, for business purposes, my wife and I elected to incorporate our video poker business as a "Subchapter S" Corporation. The business is incorporated as Winner's Pot of Gold Hot Spot, Inc. with corporate headquarters located at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550. My wife and I are equal shareholders; I am the President of the corporation and my wife is the Vice President.

7. Although at one time, we had as many as 125 employees, Winner's Pot of Gold Hot Spot, Inc. now employs approximately 80 employees, including room attendants, cashiers, managers, and the like. The corporation pays out around $20,000 per week in salaries and wages to these 80 employees.

8. Winner's Pot of Gold Hot Spot, Inc. now leases a total of 195 video poker machines from Tim's Amusement and Resort Properties South and operates them at four different physical locations. The corporation currently splits the profit received from the machines with Tim's Amusement and Resort Properties South on a 60%-40% basis.

9. For the first half of 1998, my wife and I received $1,171,620 in gross receipts and a net income of $543,616 from video poker sales at our four physical locations. After we elected to incorporate the business in July of 1998, for the second half of 1998 (July 6, 1998 to December 31, 1998), the corporation received $786,644 in gross receipts or sales, which after deductions for payroll, license fees, depreciation, and other expenses, resulted in a net income of $379,067. I received half of that amount,

$189,533, as my net shareholder's share of income from the corporation.

10. Winner's Pot of Gold Hot Spot, Inc. operates 75 video poker machines at Highway 9 East, Wallace, South Carolina, 29250. We began renting the land at this location in 1979 for payments, which toward the end of the lease, equaled as much as $1200 per month. During this time, we invested approximately $400,000 in constructing a building for bingo and video poker. In June of 1998, a fire completely destroyed that building and all improvements located on this property.

11. After the fire destroyed our building in Wallace, we decided to purchase the land for approximately $150,000 and rebuild the building. As such, I began plans in June of 1998 to construct another building designed for one purpose specifically, to accommodate video poker, in strict compliance with all of the rules and regulations for video gaming required by the State of South Carolina. The State rules and regulations make the building unusable for any other purpose because they require that certain divider walls, wiring and other specifics be incorporated into the actual building design. We devoted most of all of the profits received from our video poker business during 1999 to reconstructing the building and restoring video poker at this location. The total cost of construction for this building was approximately $750,000. Although it was difficult, we managed to retain and pay all 80 employees of the corporation during this time.

12. Winner's Pot of Gold Hot Spot, Inc. also operates 45 machines at 707 South Parker Street, Florence,

South Carolina, 29501. I acquired this property in 1996 for approximately $130,000 and subsequently built all the improvements on the land. Similar to the Wallace location, I planned to construct a single-purpose building, designed specifically to accommodate video gaming in strict compliance with all of South Carolina's rules and regulations for video gaming. Again, because this building was specifically designed to comply with the laws regarding multi-room video gaming, it is unusable for any other purpose. We began construction of the building in 1997, but due to the reconstruction of the building located in Wallace, South Carolina, we were unable to complete construction of this building until May of 1999. The total cost for the construction of this building was approximately $600,000. By reason of administrative delays caused by the South Carolina Tax Commission, we were prevented from opening our doors to video poker customers at the Florence location until late February of 2000.

13. Winner's Pot of Gold Hot Spot, Inc. also has video poker operations at two leased properties. The corporation operates 55 machines at Highway 9 West, Pageland, South Carolina, 29520. We have leased the building located on this property from Mary Campbell and Rennie Morris for a term of 10 years. Currently, one year remains on this lease. Between 1997 and 1998, we spent approximately $160,000 in renovations to the building located here, specifically to accommodate the video poker business. Winner's Pot of Gold Hot Spot, Inc. also operates 20 machines at 792 South Main Street, Society Hill, South Carolina, 29563. We have leased the building at this location from Jacob's Estate for a term of five years

and three years remain on this lease. We similarly invested approximately $60,000 in renovations to the building at this location, to accommodate our video poker business.

14. My wife and I would never have undertaken such enormous debt and expense in acquiring property, constructing two new buildings which were specifically designed for video poker, and renovating our other leased spaces for video poker if we had ever thought that video poker would be completely banned in the state of South Carolina. In fact, I was assured that, because we had adhered so strictly to the intricate laws and regulations regarding video gaming, we would have no problems in continuing our growing and successful businesses, bringing in enough sales to pay for the debt we incurred.

15. I have read over the May 8, 2000 statement of the Attorney General, stating that, as a result of Act 125, all video poker machines must be out of the state before midnight June 30, 2000, and that those of us involved who operate and possess video poker machines are subject to arrest, fines and imprisonment for merely continuing in our normal business operations. If Act 125 were to go into effect on July 1, 2000, outlawing the operation and possession of all video poker machines, we would be forced to remove all video poker machines from both the video poker locations in Wallace, South Carolina and Florence, South Carolina. Because video poker provides the only basis for generating income at both these sites, we would be forced to close down the businesses at both these locations. We would also be forced to sell both of

these properties in order to pay the outstanding mortgages and notes we currently owe to Carolina Bank and Trust. The buildings on both properties hold little value, as they were designed for only one purpose, video gaming, and would have to be completely gutted and renovated to harbor any other commercial enterprise. As for the Wallace property, while good for video poker, its location is isolated from regular traffic patterns and would draw few customers for other retail businesses. Hence, the entire property would be rendered practically worthless if video poker could not be operated there. The Florence property, just finished and opened after the delay, is nearly as unusable. It could not be converted to another use for less than $300,000, which would far exceed its fair market value after renovation. In consequence, Florence also has only nominal value without video poker.

16. Our total indebtedness at this point is $1.3 million. By rendering these two real properties valueless, Act 125 insures that they will be foreclosed and that we will have no income to pay off this debt, which encumbers our personal home and everything else we own. With no income and huge debt payments, bankruptcy and financial ruin will be the corporation's only option.

17. Furthermore, if Act 125 were to go into effect on July 1, 2000, we would be forced to remove all video poker machines the corporation currently operates at the Pageland, South Carolina and Society Hill, South Carolina locations. However, we would still be obligated under the terms of the lease agreements for the buildings at both locations. We would remain obligated for one

year under the lease agreement for the building in Pageland and for three years for the building in Society Hill. The lease payments will continue, at a total of $1,600 per month. However, there would be no source of income from these properties, as these buildings are not suited to any commercially reasonable pursuit within my capabilities, and could not be sublet for anything like the rents we are paying.

18. Although we have always done everything in our power to keep our loyal employees in jobs, even during the tough months of reconstruction at the Wallace location, outlawing the operation and possession of all video poker machines, would mean that all 80 employees of the corporation would lose their jobs and means of income. Not only would they suffer a loss, but so would their families who depend on that income.

19. Finally, the enforcement of Act 125 would destroy mine and my wife's sole source of income and we would be forced to file bankruptcy. We would be forced to sell personal properties, including our own home, to pay mortgages and other loans that we currently owe. Not only that, but my son and his wife, who currently live in our home, would lose their only means of income and effectively put us all out of a place to live. I respectfully request the intervention of this Court to help protect our business, our home and our family's livelihood and well-being.

_____

Phelix C. Byrd

Sworn to before me this ___
day of May, 2000.

_____

Notary Public for S.C.
My commission expires: ___

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-CP-

WESTSIDE QUIK SHOP, INC., PHELIX C. BYRD, REE M. BYRD, AND WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF REE M. BYRD**

I, Ree M. Byrd, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify that:

1. I am 47 years old and reside at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550, Darlington County, with my husband, Phelix C. Byrd. I am a registered voter in Darlington County.

2. I have two sons, Carrigan Byrd, Jr. and Braudy Jonathan Byrd. Jonathan was recently married and lives in our home with his wife, Janie Moore Byrd. Jonathan

works with my husband and me in our video poker business and his and his wife's sole income is derived from our video poker business.

3. In 1992, after our bingo operations became unprofitable, my husband and I entered into the video poker industry by leasing 15 draw poker machines from Tim's Amusement (formerly Harrison King Music Company). According to a written lease agreement, we split the income received from the video poker machines on a 50%-50% basis; Tim's Amusement received 50% of the income from the machines and we received the other 50%.

4. On July 6, 1998, for business purposes, my husband and I elected to incorporate our video poker business as a "Subchapter S" Corporation. The business is incorporated as Winner's Pot of Gold Hot Spot, Inc. with corporate headquarters located at 914 Sweet Bay Drive, Hartsville, South Carolina, 29550. My husband and I are equal shareholders; I am the Vice President of the corporation and my husband is the President.

5. Winner's Pot of Gold Hot Spot, Inc. employs approximately 80 employees, including room attendants, cashiers, managers, and the like. The corporation pays out around $20,000 per week in salaries and wages to these 80 employees.

6. Winner's Pot of Gold Hot Spot, Inc. now leases a total of 195 video poker machines from Tim's Amusement and Resort Properties South and operates them at four different physical locations. The corporation currently splits the profit received from the machines with Tim's Amusement on a 60%-40% basis.

7. For the first half of 1998, my husband and I received $1,171,620 in gross receipts and a net income of $543,616 from video poker sales at our four physical locations. After we elected to incorporate the business in July of 1998, for the second half of 1998 (July 6, 1998 to December 31, 1998), the corporation received $786,644 in gross receipts or sales, which after deductions for payroll, license fees, depreciation, and other expenses, resulted in a net income of $379,067. I received half of that amount, $189,533, as my net shareholder's share of income from the corporation.

8. Winner's Pot of Gold Hot Spot, Inc. operates 75 video poker machines at Highway 9 East, Wallace, South Carolina, 29250. We began renting the land at this location in 1979 for payments, which toward the end of the lease, equaled as much as $1200 per month. During this time, we invested approximately $400,000 in constructing a building for bingo and video poker. In June of 1998, a fire completely destroyed the building and all improvements located on this property.

9. After the fire destroyed our building in Wallace, we decided to purchase the land, for approximately $150,000 and rebuild the building. My husband and I began plans in June of 1998 to construct another building designed for one purpose specifically to accommodate video gaming and in strict compliance with all of the rules and regulations for video gaming required by the State of South Carolina. These State rules and regulations make the building unusable for any other purpose because they require that certain divider walls, wiring and other specifics be incorporated into the actual building design. We devoted most all of the profits received

from our video poker business during 1999 to reconstructing the building and restoring video poker at this location. The total cost of construction for this building was approximately $750,000. Although it was difficult, we managed to retain and pay all 80 employees of the corporation during this time.

10. Winner's Pot of Gold Hot Spot, Inc. operates 45 machines at 707 South Parker Street, Florence, South Carolina, 29501. My husband acquired this property in 1996 for approximately $130,000 and subsequently built all the improvements on the land. Similar to the Wallace location, we planned to construct a single-purpose building, designed specifically to accommodate video gaming in strict compliance with all of South Carolina's rules and regulations for video gaming. Again, because this building was specifically designed to comply with the laws regarding multi-room video gaming, it is unusable for any other purpose. We began construction of the building in 1997, but due to the reconstruction of the building located in Wallace, South Carolina, we were unable to complete construction of this building until May of 1999. The total cost for the construction of this building was approximately $600,000. By reason of administrative delays caused by the South Carolina Tax Commission, we were prevented from opening our doors to video poker customers at the Florence location until late February of 2000.

11. Winner's Pot of Gold Hot Spot, Inc. also operates 55 machines at Highway 9 West, Pageland, South Carolina, 29520. The corporation currently leases the building located on this property from Mary Campbell and Rennie Morris for a term of 10 years. Currently, one

year remains on this lease. Between 1997 and 1998, we spent approximately $160,000 in renovations to the building located there, specifically to accommodate our video poker business.

12. Winner's Pot of Gold Hot Spot, Inc. operates 20 machines at 792 South Main Street, Society Hill, South Carolina, 29563. The corporation currently leases the building located on this property from Jacob's Estate for a term of five years. Currently, three years remain on this lease. We also invested approximately $60,000 in renovations to the building at this location, to accommodate our video poker business.

13. My husband and I would never have undertaken such enormous debt and expense in acquiring property, constructing two new buildings, specifically designed for video poker, and renovating our other leased spaces for video poker if we had ever thought that video poker would be completely banned in the State of South Carolina. In fact, we were assured that, because we had adhered so strictly to the intricate laws and regulations regarding video gaming, we would have no problems in continuing our growing and successful businesses, bringing in enough sales to pay for the debt we have incurred.

14. If Act 125 were to go into effect on July 1, 2000, outlawing the operation and possession of all video poker machines, Winner's Pot of Gold Hot Spot, Inc. would be forced to file bankruptcy. We would be forced to remove all video poker machines the corporation currently operates from both the video poker locations in Wallace, South Carolina and Florence, South Carolina.

Because video poker provides the only basis for generating income at both these sites, we would be forced to close down the businesses at both these locations. We would also be forced to sell both of these properties in order to pay the outstanding mortgages and notes we currently owe to Carolina Bank and Trust. The buildings on both properties hold little value, as they were designed for only one purpose, video gaming, and would have to be completely gutted and renovated to harbor any other commercial enterprise. As for the Wallace property, while good for video poker, its location is isolated from regular traffic patterns and without any incentive, would draw few customers for other retail businesses. Hence, the entire property would be rendered practically worthless if video poker could not be operated there. The Florence property, just finished and opened after the delay, is nearly as unusable. It could not be converted to another use for less than $300,000, which would far exceed its fair market value after renovation. In consequence, Florence also has only nominal value without video poker.

15. Our total indebtedness at this point is $1.3 million. By rendering these two real properties valueless, Act 125 insures that they will be foreclosed and that we will have no income to pay off this debt, which encumbers our personal home and everything else we own. With no income and huge debt payments, bankruptcy and financial ruin will be the corporation's only option.

16. Furthermore, if Act 125 were to go into effect on July 1, 2000, we would be forced to remove all video poker machines the corporation currently operates at the

Pageland, South Carolina and Society Hill, South Carolina locations. However, we would still be obligated under the terms of the lease agreements for the buildings at both locations. We would remain obligated for one year under the lease agreement for the building in Pageland and for three years for the building at Society Hill. The lease payments will continue, at a total of $1,600 per month. However, there would be no source of income from these properties, as these buildings are not suited to any commercially reasonable pursuit within my capabilities, and could not be sublet for anything like the rents we are paying.

17. Outlawing the operation and possession of all video poker machines would mean all 80 loyal employees of Winner's Pot of Gold Hot Spot, Inc. would lose their jobs and means of income. Not only would they suffer a loss, but also would their families whom depend on that income.

18. My husband and I will lose our sole source of income and be forced to file bankruptcy. We will be forced to sell personal properties, including our own home, to pay mortgages and other loans that we currently owe. My son and his wife will also lose their sole source of income and place of residence.

_____

Ree M. Byrd

Sworn to before me this ___
day of May, 2000.

_____

Notary Public for S.C.

My commission expires: ___

_____

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL COURT
COUNTY OF GREENVILLE C.A. NO.:2000-CP-

PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC., AND WESTSIDE QUIK SHOP, INC.,

Plaintiffs,

ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina,

Defendants.

AFFIDAVIT OF A. CRAWFORD CLARKSON

I, A. Crawford Clarkson, Jr., pursuant to South Carolina Rule of Civil Procedure 11(c), testify as follows:

1. I currently reside and work as a Certified Public Accountant (CPA) and Attorney in Columbia, South Carolina, specializing in matters of state and federal taxation and business law.

2. I earned a BS degree in Commerce from the University of South Carolina in 1941. Subsequently, I

attended the University of South Carolina School of Law and was awarded a LLB/JD in 1955.

3. I have been a Certified Public Accountant, certified under the laws of the state of South Carolina since 1948.

4. I was admitted in 1948 as partner within the accounting firm of A.C. Clarkson and Company which became Clarkson, Harden and Gantt, CPAs, which subsequently combined with Arthur Young, later becoming Ernst & Young.

5. I was appointed by Governor Timmerman to the Joint Legislative Corporate Tax Study Committee and served as a member of the Committee from 1957 to 1958. I also served as a member and executive secretary of the South Carolina Tax Study Commission in 1958 to 1966.

6. I was appointed the Commissioner of the South Carolina Tax Commission by Governor Campbell in 1987 and appointed Chairman in 1992, in which position I served until 1995.

7. I have reviewed the 1998 corporate tax returns and financial records of the plaintiff, Winner's Pot of Gold Hot Spot, Inc. (Corporation), as well as the 1995 through 1998 individual income tax returns and other financial records of plaintiffs Phelix C. Byrd and Ree M. Byrd, for the purpose of determining the financial impact on these plaintiffs if video gaming is permitted to become illegal in South Carolina on July 1, 2000. The documents and records I have reviewed provide me with confidence that these records reflect, in material aspects, the taxable income of the entities for the years listed above. My review of these records leads me to the following opinion.

8. It is estimated that 90 percent of the gross income of the Corporation is derived from video poker operations. Phelix C. Byrd and Ree M. Byrd have invested large sums in the business now operated by the Corporation, and they have taken on significant personal debt to finance that business which is their source of income. The State's proposed complete prohibition of video poker will eliminate the Byrds' presently profitable business and the investment in time and money they have made to date.

_____

A. Crawford Clarkson, Jr.

Dated: May 23, 2000

_____

Notary Public

My commission expires: ___

Dated: May 23, 2000

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-13-___

WESTSIDE QUIK SHOP, INC., AND PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF GARY CLARDY**

I, Gary Clardy, pursuant to South Carolina Rule of Civil Procedure 11(c), testify as follows:

1. I currently reside and work as a Bookkeeper and Tax Preparer in Greenville, South Carolina where I specialize in matters involving accounting, and state and federal taxation of small businesses.

2. I have been a Tax Preparer and Bookkeeper since 1973. I earned an Associate Degree in Accounting at Greenville Technical College in 1973

3. I have prepared all tax returns for Westside Quik Shop, Inc. since 1979.

4. My familiarity with the corporate tax returns and financial records of plaintiff, Westside Quik Shop, Inc. as well as the 1995 through 1998 individual income tax returns and other financial records of its sole shareholders, Ronald J. White and James M. ("Mike") Wright, leads me to the following opinion as to the financial impact on this plaintiff if video gaming becomes illegal in South Carolina on July 1, 2000.

5. I conclude that, if video poker becomes illegal on July 1, 2000, it will completely destroy all the economic value of Westside Quik Shop, Inc. The basis of this opinion follows.

6. Westside Quik Shop, Inc. is a subchapter S Corporation, organized under South Carolina law. Its sole shareholders are Ronald J. White and James M. ("Mike") Wright. The principal physical assets of the corporation consist of two single-purpose buildings located in Greenville and Pelzer, South Carolina. These business locations are most unlikely to generate sufficient income to pay the existing mortgage payments without the profits generated by the installed video poker machines. Consequently, without video poker machines, the properties become liabilities, costing more in upkeep than they can generate in income.

7. Since the sole profit of the business is derived from video poker operations, the immediate cessation of this business on July 1, 2000 will result in the corporation's expenses far exceeding its income. (Although the corporation has a minor convenience store business, that

operation loses money each year.) Put succinctly, deprived of its sole profitable line of business and saddled with substantial expenses, the corporation's stock becomes absolutely worthless on July 1, 2000 if video poker operations become unlawful in South Carolina.

8. Mr. Ronald White and Mr. Michael Wright have invested everything in the business now operated by the corporation, and have taken on significant personal debt to finance that business. Should their sole source of income, the video poker business operated by Westside Quik Shop, Inc., abruptly cease on July 1, they will almost immediately find themselves unable to service their debt load or to pay personal and family expenses such as food, clothing and shelter. Given their debt load, and the fact that the corporation's real estate assets have little or no value without video poker, there is little doubt that they would be required to file personal bankruptcy, and that their creditors would receive only pennies on the dollar.

9. In my long career as a Bookkeeper, I have had the opportunity to become familiar with many types of small businesses, including video poker. As a business, video poker is not substantially different from many other kinds of entertainment. It requires a certain investment in tangible property, the building up of a customer base, and continual upgrading to maintain competitiveness. Mr. Ronald White and Mr. Michael Wright, and the corporation have operated and invested in their business in a prudent fashion. Their investment in the buildings and fixtures was, in large part, dictated by state regulations. As with any other entertainment business, the State's complete prohibition of video poker will completely destroy the present profitable business of the Westside

Quik Shop, Inc., eliminating all value from the substantial investment in time and money it has generated to date.

Further the deponent sayeth naught.

_____

Gary Clardy

SWORN TO BEFORE ME
This ___ day of May, 2000.

Notary Public for South Carolina
My Commission Expires: ___

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-CP-23-

WESTSIDE QUIK SHOP, INC., AND PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF FRED SEALE**

I, Fred Seale, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify that:

1. I currently reside and work in Florence, South Carolina as a Certified Public Accountant, specializing in business financial planning and tax planning for individuals and businesses.

2. I am a 1975 graduate of the University of South Carolina where I obtained a Bachelor of Science degree with a major in accounting.

3. I have over twenty years' experience in public accounting in Florence, South Carolina with the same firm, which is now Burch, Oxner, Seale Company, CPA's, PA. During that period, I have performed audits of small to medium-sized businesses, prepared corporate and individual income tax returns, and acted in a consulting capacity on business and tax matters to my clients. In November of 1981, I successfully completed the CPA exam and was licensed to practice in the state of South Carolina in March of 1982. In September of 1997, I was awarded a Certificate of Educational Achievement by the American Institute of Certified Public Accountants for the successful completion of their "Tax Planning & Advising for Closely Held Businesses" continuing education course.

4. I have been responsible for the preparation of the federal and state income tax returns of Phelix and Ree Byrd since 1997 and Winner's Pot of Gold Hot Spot, Inc. since its inception in July of 1998.

5. It is my opinion that, with the demise of video poker in South Carolina on July 1, 2000, Winner's Pot of Gold, Inc. will be unable to continue operating in its current venue and Phelix and Ree Byrd would be unable to meet their current obligations. The basis of my opinion is as follows:

a. Winner's Pot of Gold Hot Spot, Inc. is a subchapter S Corporation organized under the laws of the state of South Carolina on July 6, 1998. It operates video gaming establishments in the towns of Wallace, Pageland, Society Hill and Florence, South Carolina. Since its only revenue is generated from video poker machines, the effect of loss of revenue from

video poker on July 1, 2000 would be to cease the operations of the business. While the liabilities of Winner's Pot of Gold Hot Spot, Inc. are minimal, its assets are also minimal. The land, building and equipment used to operate these businesses are owned personally by the corporation's two shareholders, Phelix and Ree Byrd.

b. Phelix and Ree Byrd have personally purchased and constructed various buildings for the operation of video gaming. As of March 31, 2000, they were personally indebted for over 1.3 million dollars and had a monthly payment in excess of $20,000 on this indebtedness. If video poker becomes illegal on July 1, 2000, their only source of revenue to repay this indebtedness would be eliminated. The location of these establishments and the fact that the buildings are configured for video gaming would limit their marketability as commercial property should they have to dispose of the property to satisfy the debt.

Since the Byrds' income is derived almost exclusively from the operation of video gaming machines in Winner's Pot of Gold Hot Spot, Inc., it is my opinion that when video poker becomes illegal on July 1, 2000 they will be unable to meet their financial obligations and, in all probability, will be forced into personal bankruptcy.

Further the deponent sayetn naught.

_____

Fred Seale

SWORN TO BEFORE ME
This ___ day of May, 2000.

Notary Public for South Carolina
My Commission Expires: ___

_____

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE C.A. NO.: 2000-13-

WESTSIDE QUIK SHOP, INC., AND PHELIX C. BYRD, REE M. BYRD, WINNER'S POT OF GOLD HOT SPOT, INC. Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina, Defendants.	**AFFIDAVIT OF RONALD JAMES WHITE**

I, Ronald James White, pursuant to South Carolina Rule of Civil Procedure 11(c), hereby testify that:

1. I am the President of Westside Quik Shop, Inc., and have served in that capacity since the corporation was formed on October 1, 1979. I make this affidavit in support of the application of Westside Quik Shop, Inc. for a temporary injunction which, if denied, will result in destruction of the entire net profit of the corporation and bankruptcy for the corporation, its two shareholders, and their families.

2. I was born, and have lived all my life, in the Greenville, South Carolina area. I am now 53 years old and I currently reside at 675 Hester Store Rd., Easley, South Carolina, 29640, in Pickens County, with my wife. I am a registered voter in Pickens County. I have an associate degree in business, which I received from Greenville Technical College in 1969.

3. I am married to Cindy White, who does not work outside the home and has no independent source of income apart from our family business, the Westside Quik Shop.

4. For the past 22 years I have supported my family with the income derived from our family business the Westside Quik Shop. I got into this business in 1978 when James Michael Wright and I leased an old, abandoned Exxon service station located at 821 West Parker Road, Greenville, South Carolina, 29611, in Greenville County. With a loan of $15,000, we converted the service station into a convenience store that sells groceries, gas, and heating fuel. The Westside Quik Shop was one of the first convenience stores in the area. Since that time, the Westside Quik Shop has continued to serve the people in the area, many of whom have no transportation to other stores for food and fuel supplies.

5. In 1981, Westside Quik Shop, Inc. bought the real property at 821 West Parker Road, as well as the building and all improvements located there. At that time, we installed three video poker machines in the convenience store to supplement our very limited income derived from the sales of gas and groceries. The additional income provided by these video poker machines made it

possible for Mr. Wright and me to support our families. Without the income from those video poker machines, the Westside Quik Shop would have closed many years ago, because we cannot otherwise compete with large chain convenience stores. The income from the video poker machines makes it possible for us to pay the mortgage on the property and to maintain competitive prices on our groceries and gasoline, providing a decent local market to the moderate-income neighborhood surrounding the store. Few of our customers spend more than a couple of dollars on the machines when they come in to purchase goods, but it all adds up to provide a profit on a business that would otherwise lose money.

6. In approximately 1989, we decided to purchase approximately 20 video poker machines and lease them for use at other locations. Our customary arrangement was to allow the operator of the location to retain 50% of the profit from the machines, paying us the other 50%. The leasing of these video poker machines has remained a profitable business, supplying additional income to Westside Quik Shop, Inc.

7. In 1994, the South Carolina legislature passed legislation allowing each county to vote, on a county by county basis, whether to allow the operation of video poker machines in each respective county. The citizens of Greenville County voted to allow the continued operation of video poker machines in Greenville County. As a result of the referendum's results, I felt confident that video poker was here to stay (at least during my remaining productive years) in Greenville County. Consequently, Westside Quik Shop, Inc. decided to invest a substantial sum to upgrade our convenience store and video poker

business, in specific reliance upon the continued validity of video poker in Greenville, South Carolina.

8. For example, because a new state law required extensive upgrading of our underground gasoline tanks to comply with federal environmental regulations, in 1998 we undertook an extensive (and expensive) program to upgrade in accordance with state requirements. The total cost of these upgrades – over $120,000 – would have required us to close the business if we had not had video poker income to help defray the cost. We borrowed the money to make these improvements in direct reliance on the expectation that video poker would continue in Greenville, as the voters had decided. We cannot make the payments on our $230,000 mortgage on this property without the income from our video poker business.

9. Also in reliance on our ability to continue our video poker business, in 1997 we bought Dave's Grocery, a convenience store, located at 599 Old Hundred Rd., Pelzer, South Carolina, 29669, for $235,000. We leased the property back to David Leopard, and placed three of our video poker machines, on the premises. We purchased Dave's Grocery specifically because we could place the video poker machines there. Since the payment on the $200,000 mortgage of about $3,000 per month is twice the rent we receive from Mr. Leopard, it is only the income from the video poker machines which makes Dave's Grocery a profitable business venture.

10. Without video poker machines, both the Westside Quik Shop and Dave's Grocery are unprofitable, generating far less income than required to pay the loans and other expenses of the businesses. Should Westside

Quik Shop, Inc. be deprived of the income from our video poker business, we would lose both of these stores to foreclosure.

11. In 1998 the Department of Revenue established a requirement that all video poker machines be electronically connected to a central computer system, which was to be created by the State of South Carolina. None of the machines we owned at that time contained the computer electronics necessary to comply with this requirement. Consequently, for the exclusive purpose of complying with these new state regulations, Westside Quik Shop, Inc. purchased 18 new "Pot of Gold" video poker machines, at a cost of approximately $144,000. Seventeen of these machines have been installed, with one in storage. Although there is nothing wrong with our "Pot of Gold" machines, enforcement of Act 125 will render them virtually worthless, with only nominal salvage market value. At the time we purchased these new "Pot of Gold" machines, we had no reason to believe that the State would outlaw their use. To the contrary, had we been informed that the State would outlaw video poker without implementing the centralized computer system, we would never have purchased these new machines or ordered and installed the necessary phone lines required by the State to communicate with these machines.

12. Moreover, we have paid more than $80,000 to the State and local governments in the past two years in video poker machine licensing fees. At no time prior to the South Carolina Supreme Court's decision in October 1999 did any state or local official inform me that my entire business would become unlawful on July 1, 2000, and that my entire investment in these machines would

be lost. To the contrary, the State requirement for sophisticated, state-of-the-art machines led me to believe that our business would continue for the indefinite future.

13. I have read the May 8, 2000 statement of the Attorney General, stating his position that all video poker machines must be out of the state before midnight June 30, 2000, and that those of us involved with the Westside Quik Shop are subject to arrest, fine, and imprisonment for conducting business the same as we have since 1981. From his statement, I also understand that the State intends to destroy my new Pot of Gold machines, in which Westside Quik Shop, Inc has invested over $224,000 in purchase costs and government license fees. Should this occur, the financial ramifications for my family, Mr. Wright's family, and the three other employees of Westside Quik Shop, Inc. will be devastating. We will lose our businesses, our homes, and everything we own. I have already begun investigating the possibility of bankruptcy.

14. Westside Quik Shop, Inc. has always run an ethical and fair business, providing a valuable community service. The enforcement of Act 125 will destroy this business of 22 years, leaving me and my family with huge debts and no source of income. I request the intervention of this Court to save and protect us.

Further the deponent sayeth naught.

Ronald James White

SWORN TO BEFORE ME
This ___ day of May, 2000.

Notary Public for South Carolina
My Commission Expires: ___

MOTION FILED

OCT 19 2000

(2)

No. 00-433

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., ET AL.,

Petitioners,

vs.

ROBERT M. STEWART, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA ASSOCIATION OF CONVENIENCE STORES

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12pp

QUESTION PRESENTED

May a state, pursuant to its police power, take private property and destroy a previously legal business that is not a public nuisance without paying just compensation for the taking?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE SOUTH CAROLINA ASSOCIATION OF CONVENIENCE STORES

The South Carolina Association of Convenience Stores respectfully petitions this Court for leave to file the annexed brief Amicus Curiae pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this Amicus brief. However, the Respondents have refused to consent to the filing of the Amicus brief.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina Association of Convenience Stores is a non-profit South Carolina corporation formed for the purposes of representing the trade interests of convenience stores in South Carolina. The Association was founded in 1976. The Association has approximately 270 members. Convenience stores rely on revenue from video gaming and plan fiscally based upon such profits. The vast majority of convenience stores in South Carolina have video gaming machines. Of the 28,000 to 32,000 total machines licensed in South Carolina for 1997 to 1998, 9,000 to 10,000 video game machines were located in convenience stores. Consequently, the issues before the

[1] Copies of the request for consent have been filed with the Clerk of Court. Petitioner's consent has also been filed with the Clerk of Court.

Court are of extreme interest to all members of the Association, and a number of, if not all of the members of the Association, have been affected by the statute at issue.

Respectfully submitted by:

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MOTION FOR LEAVE 1

TABLE OF AUTHORITIES ii

BRIEF AMICUS CURIAE 1

IDENTITY AND INTEREST 1

OPINIONS BELOW AND JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING CERTIORARI 2

I. The Legislature's Power to Regulate Gambling Does Not Support The Taking Of Video Game Machines Without Just Compensation 5

II. The History of Video Gaming Regulation In South Carolina Does Not Justify Abruptly Declaring Video Game Machines Contraband *Per Se* Without Paying Just Compensation 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Bennis v. Michigan, 516 U.S. 442 (1996) 3, 4

Darlington Theatres, Inc. v. Coker, 2 S.E.2d 782 (S.C. 1939) 8

Devines v. Maier, 665 F.2d 128 (7th Cir. 1981) 7

Johnson v. Collins, 508 S.E.2d 575 (S.C. 1998) 7, 8, 9

Lawton v. Steele, 152 U.S. 133 (1894) 5, 6

Mibbs v. South Carolina Dep't of Revenue, 524 S.E.2d 626 (S.C. 1999) 8

Pennsylvania Coal Co. v. Mahon, et al., 260 U.S. 393 (1922) 2, 3

State v. 192 Coin-Operated Video Game Machines, 525 S.E.2d 872 (S.C. 2000) 4

Tyson & Brother v. Banton, 273 U.S. 418 (1927) 7

Westside Quik Shop, Inc. v. Stewart, No. 25758, 2000 Lexis 151 (S.C. June 21, 2000) 2, 3, 4, 5, 7, 8

CONSTITUTIONS

U.S. Const. Amend. V 2, 3, 4, 5, 7, 9

STATUTES

SC. Code Ann. § 12-21-2710 ..... 4, 6

SC. Code Ann. § 12-21-2712 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

Luttrell, *Video Poker: A Survey of Recent Developments Surrounding the Legal and Moral Debate*, 51 S.C. L. Rev. 1065 (2000).....6, 9

South Carolina Department of Revenue's Summary of Video Game Machine Quarterly Reports for the 4th Quarter 1998, October 1 – December 31, 1998 and for the Calendar Year 1998 9

BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA ASSOCIATION OF CONVENIENCE STORES[2]

The South Carolina Association of Convenience Stores respectfully submits this brief Amicus Curiae.

IDENTITY AND INTEREST OF AMICUS CURIAE

The identities and interests of Amicus Curiae are set forth in the preceding motion and are adopted herein.

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and jurisdictional statement.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, and the statement of the case of Amicus Curiae of The South Carolina Coin Operator's Association, Inc.

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[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

REASONS FOR GRANTING CERTIORARI

Private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. The South Carolina Supreme Court in *Westside Quik Shop, Inc. v. Stewart*, No. 25758, 2000 Lexis 151 (S.C. June 21, 2000) eviscerated the protection accorded the video gaming industry under the Fifth Amendment's Takings Clause. Specifically, the court condoned the abrupt ban of video gaming by the South Carolina legislature without requiring just compensation under the Fifth Amendment. The petition for certiorari should be granted because the South Carolina Supreme Court has ignored this Court's precedent and established a dangerous rule that allows the legislature arbitrarily to define private property as contraband *per se*, thereby avoiding the Fifth Amendment's requirement of just compensation.

In 1922, Justice Holmes foresaw the danger that has now materialized in South Carolina: "The protection of private property in the Fifth Amendment pre-supposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon, et al.*, 260 U.S. 393, 415 (1922). The South Carolina legislature and Supreme Court have followed this "natural tendency" of further qualifying private property by serving up video gaming for the police power axe. South Carolina's regulation of video game machines has gone "too far" and must be recognized as a taking. *See id.*

Justice Holmes recognized that in "exceptional cases," like the blowing up of a house to stop a conflagration, the taking may not be compensable based upon preserving the public's health and welfare. *See id.* However, even in these cases, Justice Holmes warned of the exception swallowing the rule: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

Aside from the power of eminent domain, states routinely regulate private property under their police power. The degree to which a state may take private property under its police power without paying just compensation is the important Fifth Amendment issue before this Court. The South Carolina Supreme Court's decision in *Westside Quik Shop* represents an extreme trend toward eroding the Fifth Amendment's just compensation protection under the guise of the state's police power.

The extreme to which the South Carolina Supreme Court has gone to destroy video gaming without paying for it becomes evident when one examines the logic proposed in *Westside Quik Shop*. The court below began its discussion by declaring: "The forfeiture of contraband that comports with the Fourteenth Amendment's Due Process Clause is not a compensable taking under the Takings Clause of the Fifth Amendment." *Westside Quik Shop v. Stewart*, No. 25158, 2000 Lexis 151 at *8 (S.C. June 21, 2000). To support this proposition the court cited *Bennis v. Michigan*, 516 U.S. 442, 452 (1996). *Bennis*, however, stated a proposition that Justice Holmes had originally observed in *Mahon* – that in exceptional, public

nuisance cases, private property may be destroyed by the government without compensating the owner. In *Bennis*, a Michigan court ordered that an automobile be forfeited as a public nuisance because the owner engaged in sexual activity with a prostitute in the automobile. This Court affirmed. Thus, the South Carolina Supreme Court's linking of the Due Process Clause to the Takings Clause merely begs the question of whether video gaming is the type of activity that fits within those "exceptional cases" that justify the taking of private property under the state's police power without just compensation.

The court in *Westside Quik Shop* further referred to its opinion in *State v. 192 Coin-Operated Video Game Machines*, 525 S.E.2d 872 (S.C. 2000) to suggest that the forfeiture of video gaming machines in South Carolina accords with due process requirements. In that decision the court held that certain video game machines, declared illegal under Section 12-21-2710 of the South Carolina Code, were contraband *per se* and could be destroyed by the state, even though they were only being stored in a warehouse and were not operational. *See 192 Coin-Operated Video Game Machines*, 525 S.E.2d at 879. The court further held that due process would not be violated because the magistrate's examination of the seized machines under section 12-21-2712 included an opportunity for the owner of the machines to be heard concerning their legality. *Id.* at 883.

However, the court's holding in *192 Coin-Operated Video Game Machines* provides no guidance on whether the South Carolina legislature can abruptly declare lawfully acquired video game machines contraband *per se*, and avoid the just compensation requirement of the Fifth Amendment. Video game machines have historically been

legal in South Carolina and have supported a prosperous industry employing thousands of workers. Convenience stores all over the state have relied on the profits produced from video gaming and, in turn, created new jobs and planned their future with video gaming. Such investment and planning was not entered into lightly but was developed carefully as the legislature and the courts consistently reinforced the legality of the video gaming industry in South Carolina. Consequently, when the South Carolina Supreme Court abruptly declared video game machines contraband as of July 1, 2000, convenience store owners found their businesses and employees in apocalyptic flux. There was significant loss of private property in an industry that was, until recently, a viable and accepted force in the community. Against this backdrop, the Fifth Amendment requires South Carolina to pay just compensation for the taking.

I. The Legislature's Power To Regulate Gambling Does Not Support The Taking Of Video Game Machines Without Just Compensation.

In *Westside Quik Shop*, the court stated: "Gaming devices in general have long been recognized as legitimately within the police power of the State to control or take by forfeiture, *Lawton v. Steele*, 152 U.S. 133, 136 (1894), ..." *Westside Quik Shop*, 2000 Lexis 151 at *9. The court's reliance upon *Lawton v. Steele* illustrates the fallacy of the court's logic and the danger in its holding. In *Lawton* the United States Supreme Court made the unremarkable observation that "[m]any articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but

may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed." *Lawton*, 152 U.S. at 142. The actual controversy in *Lawton* concerned the taking and destruction of fishing nets for the purpose of preserving wildlife in New York. The Court's analogy to instruments of gambling was merely an example of the government taking contraband derivative of the underlying nuisance.[3] Its decision was based upon the general maxim that a state's police power was broadly defined to protect the public safety, health, and morals. *See Lawton*, 152 U.S. at 136.

However, the Court in *Lawton* was emphatic that "[t]he legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Id.* at 137. The Court further noted that if a net that was not used in violation of the law was taken and destroyed, then the owner could institute an action to recover the net's value. *See id.* at 142.

Lawton provides no authority for the South Carolina legislature to suddenly declare video game machines contraband *per se* and avoid paying just compensation where video gaming was historically accepted in South Carolina prior to the judicial activation of sections 12-21-2710 and 2712. *Lawton* was a clear public nuisance case that recognized the state's power to declare certain property contraband when used for a purpose that constituted a

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[3] "Derivative contraband" are items that are only illegal based upon use. "Contraband *per se*", on the other hand, is property inherently unlawful to possess. *See* Luttrell, *Video Poker: A Survey of Recent Developments Surrounding the Legal and Moral Debate*, 51 S.C. L. Rev. 1065 (2000).

nuisance. The ban of video game machines falls outside the realm of clear public nuisance. Moreover, there has been no legislative or judicial finding as to the public need for destroying the video gaming industry. Instead, the video gaming issue represents a slight sway of public opinion that, less than a year before, appeared to be well in favor of video gaming. In this sense, the progressive words of Justice Holmes are germane: "The truth seems to me to be that, **subject to compensation when compensation is due**, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J. dissenting) (emphasis added). In this case, compensation is due under the Fifth Amendment.

II. The History Of Video Gaming Regulation In South Carolina Does Not Justify Abruptly Declaring Video Game Machines Contraband *Per Se* Without Paying Just Compensation.

The South Carolina Supreme Court declared in *Westside Quik Shop*: "we have consistently deferred to the legislature's determination of what gaming devices must be sacrificed for the public welfare. *See, e.g., Johnson v. Collins.*" *Westside Quik Shop*, 2000 Lexis 151 at *10. Despite this conclusory statement, the state may not destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed. *See Devines v. Maier*, 665 F.2d 128 (7th Cir. 1981). In *Johnson v. Collins*, 508 S.E.2d 575 (S.C. 1998), the court did defer to the legislature but declared that video game machines were not prohibited "lotteries" within the meaning of the South Carolina constitution; thus, video

gaming was legal.[4] The court carefully illustrated that the South Carolina Constitution and related caselaw had never prohibited games of chance or gambling *per se*. *See Johnson*, 508 S.E.2d at 577-78. "The framers of our Constitution clearly distinguished between 'lottery' and 'gambling or betting on games of chance.' " *Id.* at 578. As aptly stated in one of the seminal South Carolina lottery cases, "the constitutional and legislative prohibition is directed at a special type of vice in the fields of advertising and gift enterprises – the type that has come to be denominated both in the law and in common parlance by the word lottery." *Darlington Theatres, Inc. v. Coker*, 2 S.E.2d 782, 786 (S.C. 1939).

Thus, as recently as 1998, the South Carolina Supreme Court in *Johnson v. Collins* reaffirmed the historic rule in South Carolina that gaming devices were generally legal, except for lotteries. It is curious, then, that the court in *Westside Quik Shop* would cite *Johnson v. Collins* to support its holding that video game machines could be sacrificed without just compensation. *Johnson v. Collins*, instead, demonstrates that throughout South Carolina history lotteries were the only type of gambling consistently prohibited by law.

The South Carolina Supreme Court has suggested in a separate decision that the video gaming industry "assumed the risk" by purchasing video poker machines when gambling was such a highly debated issue in South Carolina. *See Mibbs v. South Carolina Dep't of Revenue*, 524

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[4] Lotteries have only been illegal in South Carolina since the constitutional amendment of 1868.

S.E.2d 626, 627 (S.C. 1999). Despite this view, the legality of video gaming has repeatedly been affirmed. For instance, in 1994, a series of county-by-county referenda revealed a high level of public support for video gaming. *See* Luttrell, *Video Poker: A Survey of Recent Developments Surrounding the Legal and Moral Debate*, 51 S.C. L. Rev. 1065, 1083-84 (2000). In 1998, the court in *Johnson v. Collins* further reinforced the legitimacy of video gaming.

It was not until October 1999 that the abrupt and unforeseen destruction of video gaming came to pass in South Carolina. Before this occurrence, the industry, in reliance upon the historic legality and viability of video gaming, built a business that accumulated annual revenue of $1.45 billion and employed 57,000 workers.[5] *See*, Luttrell, 51 S.C. L. Rev. at 1065, n.3. This was not a clandestine industry on the fringe of public morality. Moreover, video gaming certainly was not a nuisance like prostitution or drug trafficking. Rather, it was a well-established industry that had its entire way of life pulled out from under it by sudden legislative enactment. The owners and operators of video game machines are entitled to be compensated for their losses under the Fifth Amendment.

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[5] In 1998, the average payout per machine was $62,270. The average gross profit was $24,993 per machine. *See South Carolina Department of Revenue's Summary of Video Game Machine Quarterly Reports for the 4th Quarter 1998, October 1 – December 31, 1998 and for the Calendar Year 1998.*

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the Petition for Writ of Certiorari.

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No. 00-433

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., ET AL.,

Petitioners,

vs.

ROBERT M. STEWART, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA COIN OPERATOR'S ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE SOUTH CAROLINA COIN OPERATOR'S ASSOCIATION, INC.

The South Carolina Coin Operator's Association, Inc. respectfully petitions this Court for leave to file the annexed brief Amicus Curiae pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this Amicus brief. However, the Respondents have refused to consent to the filing of the Amicus brief.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

The South Carolina Coin Operator's Association is a non-profit South Carolina corporation formed for the purposes of representing the trade interests of various businesses and individuals who operate gaming machines in South Carolina. The Association was founded in 1963 and has 126 members. The Association's members all owned or operated some form of gaming machines, including video games, pinball machines, as well as video poker machines such as are at issue in the matter before the Court. Consequently, the issues before the Court are of extreme interest to all the members of the Association, and a number of, if not all of the members of the Association have been affected by the statute at issue in this matter.

[1] Copies of the request for consent have been filed with the Clerk of Court. Petitioner's consent has also been filed with the Clerk of Court.

The South Carolina Coin Operators Association has a substantial interest in supporting the Petition for Certiorari because the South Carolina Supreme Court's decision upholding the South Carolina statute banning all video poker machines within the State of South Carolina raises important questions concerning the limits placed on the police power by the takings clause of the Fifth Amendment. This question is especially significant in the situation before the Court here, since the State had, for many years, permitted and regulated the activity it now has banned completely. As a result, those who invested in their property with the expectation that video gaming was and would remain permissible have had their property destroyed as the result of an arbitrary exercise of the State of South Carolina's police power, an exercise that received the approval of the South Carolina Supreme Court but that contradicts this Court's ruling on takings and the proper limits of the police power.

This brief will discuss the historical context in which video gaming became legal in South Carolina, the statutory and regulatory developments that governed the industry, and the resulting expectations of those who invested in a legal enterprise and whose property has now, as the result of a legislative about-face, been destroyed. In these circumstances, the South Carolina Legislature's exercise of its police power to destroy the investment-backed expectations of those who invested in this industry, and the South Carolina Supreme Court's approval of this action, raises important questions about the proper interplay between the police power and the Fifth Amendment's takings clause.

For the foregoing reasons, the South Carolina Coin Operator's Association requests that this motion to file the annexed brief Amicus Curiae be granted.

October 20, 2000.

Respectfully submitted by:

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE ... 1

OPINIONS BELOW AND JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. The Takings Clause, With Its Origins In Equity, Protects Those Who Reasonably Rely on Government Action When Investing in Property and Requires Government to Compensate Those Whose Property is Rendered Valueless by a Government's Abrupt Change in Policy, Even When Government Invokes the Police Power as a Basis For Action 8

A. The Equitable Basis for "Takings" Jurisprudence Provides a Historical Context for Evaluating a Government's Action Pursuant to the Police Power 11

B. Property Rights Protect All Non-Nuisance Uses That May Be Made of Property 15

C. Video Gaming Property is Not Subject of Uncompensated Seizure as a Nuisance 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960)..... 10

Barret v. Hampton, 4 S.C.L. (2 Brev.) 226 (1807)..... 3

Berkebile v. Outen, 426 S.E.2d 760 (S.C. 1993)..... 1, 2, 3

Bradshaw v. Rodgers, 20 Johns. 103 (N.Y. 1822)..... 12

Fuller v. United States, 409 U.S. 488 (1973)..... 13

Greater New Orleans Broadcasting Assoc. v. United States, 527 U.S. 173 (1999)..... 19

Hasket v. Wootan, 10 S.C.L. (1 Nott. & McC.) 180 (1815)..... 3

Joytime Distributors & Amusement Co. v. South Carolina, 528 S.E.2d 647 (S.C. 1999)..... 7

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 8

Lott v. Claussens, Inc., 163 S.E.2d 615 (1968)..... 15

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)..... 15

Miller v. Schoene, 276 U.S. 272 (1928)..... 17

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)..... 14

People v. Platt, 17 Johns. 195 (N.Y. 1819)..... 12, 14, 15

Petition of Mount Washington Road Co., 35 N.H. 134 (1857)..... 13

Powell v. Red Carpet Lounge, 311 S.E.2d 719 (S.C. 1984)..... 5

TABLE OF AUTHORITIES – Continued

Page

Sinnickson v. Johnson, 17 N.J.L. 129 (1839) 13

State v. Blackmon, 403 S.E.2d 660 (1991)..... 16

State v. Pinchback, 9 S.C.L. (2 Mill Const.) 128 (1818) 3

United States v. Commodities Trading Corp., 339 U.S. 121 (1970) 13

Young v. McKenzie, 3 Ga. 31 (1847) 13

CONSTITUTIONS

U.S. Const. Amend V.....7, 8, 9, 10, 11, 17, 20

S.C. Const., Art. XIV, § 2 (1868)..... 4

S.C. Const., Art. XVII, § 7 (1975)..... 5

STATUTES

S.C. Code Ann. §§ 12-21-2770 – 12-21-2804 (1993 Supp.).....5, 6

S.C. Code Ann. § 16-19-10 (Law. Co-op. 1976)..... 3

S.C. Code Ann. § 16-19-50 (Law. Co-op. 1976)..... 5

S.C. Code Ann. § 16-19-60 (Law. Co-op. 1976).....5, 16

S.C. Code Ann. § 16-19-70 (Law. Co-op. 1976)..... 4

S.C. Code Ann. § 16-19-90 (Law. Co-op. 1976)..... 5

S.C. Code Ann. § 16-19-130 (Law. Co-op. 1976)..... 5

TABLE OF AUTHORITIES – Continued

Page

S.C. Code Ann. § 16-19-160 (Law. Co-op 1976) 5

S.C. Code Ann. § 32-1-10 (Law. Co-op. 1976)..... 2

Appendix to Act 322 of 1712, 16 2 C. c. 7, reprinted in 2 S.C. Stat. at Large 517 (1837)..... 2

Act 320 of 1712, reprinted in 2 S.C. Stat. at Large 396 (1837)..... 4

Act 784 of 1751, reprinted in 3 S.C. Stat. at Large 729-30 (1838)..... 3

1802 Acts and Resolutions..... 5

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TABLE OF AUTHORITIES – Continued

Page

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Final Report, National Gambling Impact Study Comm'n (June 1999)..... 6

BRIEF AMICUS CURIAE OF THE SOUTH CAROLINA COIN OPERATOR'S ASSOCIATION, INC. IN SUPPORT OF PETITIONER

The South Carolina Coin Operator's Association Institute respectfully submits this brief Amicus Curiae.[2]

IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of Amicus Curiae are set forth in the preceding motion and are adopted herein.

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and jurisdictional statement.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, and in addition, adds the following: Gambling has not always been illegal in South Carolina. *Berkebile v. Outen*, 426 S.E.2d 760, 762 (S.C. 1993). For example, during the Colonial period, as Walter Edgar points out in his recent and comprehensive study, people enjoyed attending fairs at which they could be amused by both cockfights and horse races. Walter Edgar, *South Carolina: A History*, 171 (1998 U.S.C. Press). These diversions commonly included some form of gambling; "Carolinians of all classes (including slaves) attended cockfights and horse races and placed their bets . . . ." *Id.*

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[2] In compliance with Supreme Court Rule 37.6, Amicus Curiae represent that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the Amicus Curiae and their members, made a monetary contribution for the preparation or submission of this brief.

Statutes placing some limitations on gambling can be traced as far back as 1712 when the Legislature adopted the English Statutes of Anne. *Cf. Berkebile v. Outen*, 426 S.E.2d 760, 763 (S.C. 1993) (discussing adoption of the Statutes of Anne). In particular, Act 141, initially passed in 1664 during the reign of Charles the Second, addressed "deceitful, disorderly and excessive Gameing." As the preamble to this Act made clear, Act 141 was not intended to ban gaming altogether. Instead, it recognized that "all lawful games and exercises should not be otherwise used, than as innocent and moderate recreations . . . ." The Act, which contains a list of common entertainments of the time, addressed the problem of cheating by those who by:

> fraud, shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice tables, tennis, bowles, kettles, shovel-board; or in or by cock-fightings, horse races, dog matches, foot races, or other pastimes, game or games whatsoever, . . . win, obtain, or acquire to him or themselves, . . . any sum or sums of money, or other valuable thing or things whatsoever; that then every person and persons so offending as aforesaid, shall *ipso facto* forfeit and lose treble the sum or value of money, or other thing or things so won . . . .

Appendix to Act 322 of 1712, 16 2 C. c. 7, reprinted in 2 S.C. Stat. at Large 517 (1837). Another part of the Act provided a remedy for anyone who lost more than 100 pounds at any one time while playing or betting on the games and pastimes enumerated. Thus, the Act made cheating illegal, and it encouraged citizens to be moderate in their gaming. This part of the Act, as amended and containing a fifty dollar limit, is still in effect today. S.C. Code Ann. § 32-1-10 (Law. Co-op. 1976). It has been

applied to losses incurred while playing video poker. *See, e.g., Berkebile,* 426 S.E.2d at 763.

Likewise, decisional law from the early nineteenth century reflects the legality of at least some forms of gaming during the early years of the State's history. *See, e.g., Barret v. Hampton,* 4 S.C.L. (2 Brev.) 226 (1807) (twenty dollar wager on a horse race was not illegal); *Hasket v. Wootan,* 10 S.C.L. (1 Nott. & McC.) 180 (1815) ("[W]agers on horse racing, have not been deemed illegal, either at common law, or under the statutes, if they be fair and under the sums specified in the statutes."); *State v. Pinchback,* 9 S.C.L. (2 Mill Const.) 128 (1818) (noting that raffles are not illegal lotteries, and have "been practised in this State since its first settlement").

Wagering was not the only type of gambling tolerated in the colony. Lotteries, both public and private, were also legal until 1751, when the Legislature enacted the first statute prohibiting "private" lotteries. This statute, passed as Act no. 784 that year, made it a crime to:

> erect, set up, continue or kept, any lottery, under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise or other things whatsoever, by way of lottery or chances, or by lots, tickets, numbers or figures
>
> . . . .

Act 784 of 1751, reprinted in 3 S.C. Stat. at Large 729-30 (1838). Although this statute also provided it would remain in force for only a period of ten years, the 1762 Legislature re-enacted it.[3]

While private lotteries were illegal, public lotteries were used to raise funds for various projects. Between the

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[3] This statute still exists today in substantially the same form. S.C. Code Ann. § 16-19-10 (Law. Co-op. 1976).

late 1700s and 1868, when the post-war Constitution, containing a prohibition on all lotteries, was enacted, the Legislature passed several statutes authorizing public lotteries for various purposes. In particular, these lotteries were intended to raise funds to build churches and schools and to provide funding for certain charitable, literary, or industrial groups. Funds collected in this way were used, for example, to fund a home for the poor in Georgetown, to establish cotton manufactories, to raise money for the Savannah River Literary Society, and to build churches. Not until 1868 did South Carolina finally decide to prohibit this form of raising money through a provision in its post-war Constitution. S.C. Const., Art. XIV, § 2 (1868). A public referendum is to be held this November on a proposed Constitutional amendment that would again permit a public, statewide lottery.

In 1790, the Legislature enacted "An Act for the better observation of the Lord's Day, commonly called Sunday," which prohibited anyone from, among other activities, keeping "any gaming table or permit any game or games to be played in his house on the Sabbath day . . . ." Act 320 of 1712, reprinted in 2 S.C. Stat. at Large 396 (1837); *see also* S.C. Code Ann. § 16-19-70 (Law. Co-op. 1976) (prohibiting gaming tables or "playing games" on the Sabbath). Then, in 1802, the Legislature passed a statute banning certain forms of gambling in public places. The 1802 gambling statute outlawed:

> any game or games, with cards or dice, or at any gaming table, commonly called A B C or E O, or any gaming table, known or distinguished by any other letters, or by any figures, or rowley powley table, or at rouge and noir, or at any faro bank, or at any other gaming table or bank of the same or the like kind, under any denomination whatsoever . . . .

1802 Acts and Resolutions at 34-35; *see also* S.C. Code Ann. § 16-19-50 (continuing this prohibition). Later in the nineteenth century and early part of the twentieth century, the South Carolina Legislature outlawed other particular forms of gambling, including betting on elections, gambling by railroad passengers, bookmaking, and gambling through punchboards. *See, e.g.*, S.C. Code Ann §§ 16-19-90, 16-19-130, 16-19-160 (containing current versions of these enactments).

During more recent history, as attitudes toward gambling began to change nationwide, South Carolina enacted some exceptions to the heretofore broad prohibitions against gambling. For example, through a Constitutional amendment, enacted by popular vote in 1975, bingo was specifically exempted from the prohibition against lotteries. The constitutional prohibition against lotteries now excepts "[t]he game of bingo, when conducted by charitable, religious or fraternal organizations . . . or when conducted at recognized annual State and county fairs." S.C. Const., Art. XVII, § 7 (1975). Consequently, bingo parlors and church-sponsored bingo games are today readily available to South Carolina's citizens.

Similarly, in 1975, the South Carolina Legislature specifically exempted from the prohibitions found in chapter 19 of title 16 "coin operated nonpayout machines with a free play feature." S.C. Code Ann. § 16-19-60. The South Carolina Supreme Court made clear that this provision applied to video poker machines in *Powell v. Red Carpet Lounge*, 311 S.E.2d 719 (S.C. 1984). In 1993 the South Carolina legislature enacted the Video Game Machines Act, S.C. Code Ann. §§ 12-21-2770 through 12-21-2804. This Act set forth requirements for licensing, taxing, and regulating video poker machines. License fees

were set at 2,000 dollars per machine. Only five machines could be set up at any single place. *Id.* at 12-21-2804(A). Advertising and offering special inducements to play were prohibited. *Id.* at (B). Persons under twenty-one years of age could not play, and no one could play on Sunday. *Id.* at (C) and (E).

The 1993 Act also provided for a county-by-county referendum to determine, for each county, whether to permit video gaming. Voters in thirty-four of the State's counties voted to continue the activity (including, for example, Greenville County), while twelve counties voted to discontinue video gaming. Statewide, approximately 58% of the voters voted in favor of continuing video gaming, and 42% voted against. As a result of the outcome, video gaming operators were confident that the law would continue to enable their businesses to operate, and some of them began to increase their investments in their businesses. (*See, e.g.*, Affidavit of James Ronald White at ¶ 7.)

The legal developments over the latter quarter of the twentieth century in South Carolina, which led to an official acceptance of certain forms of gaming, were mirrored by a relaxation of the rules against gambling in numerous other states. According to the June, 1999 Report of the National Gambling Impact Study Commission, at least forty-eight states have legalized gambling in some form. Final Report, National Gambling Impact Study Comm'n (June 1999). Thirty-seven states have state-run lotteries, and casinos are now legal in twenty-eight states, including North Carolina. In 1998, 52 percent of American residents played a lottery, 29 percent gambled at a casino, 7 percent bet on horses, and 6 percent played bingo. Nationwide, thirty-four billion dollars was spent on lotteries alone.

The legal developments regarding video gaming in South Carolina were therefore not unusual when viewed through a national perspective, nor was there anything in South Carolina's legal history that would forecast the complete and sudden disruption, in July, 2000, of what had become a vital, statewide industry.

That is what occurred, however. In 1999, in Act 125, the South Carolina Legislature decided that it would put to a statewide public referendum the issue of whether video gaming should remain legal. Act 125 also contained a provision that reclassified video gaming machines as "contraband" as of July 1, 2000, in the event no referendum was held. When the South Carolina Supreme Court ruled that the referendum was an improper delegation of the lawmaking power to the electorate, it also upheld the portion of the Act that declared the machines to be contraband and ruled that the Act outlawed video gaming. *Joytime Distributors & Amusement Co. v. South Carolina*, 528 S.E.2d 647 (S.C. 1999).

SUMMARY OF ARGUMENT

The takings clause of the Fifth Amendment has its origins in equitable notions of fairness. Thus, the Fifth Amendment protects property rights when a government induces investment in that property, even if the government makes no express contract or other promise to induce the investment. Nor can a government avoid the Fifth Amendment's requirements by reversing its course, by labeling a heretofore legal activity "illegal," and by calling its actions "valid" under the police power.

ARGUMENT

I. The Takings Clause, With Its Origins in Equity, Protects Those Who Reasonably Rely on Government Action When Investing in Property and Requires Government to Compensate Those Whose Property is Rendered Valueless by a Government's Abrupt Change in Policy, Even When Government Invokes the Police Power as a Basis for Action.

This Court has recognized that the Fifth Amendment, and in particular the takings and due process clauses, protects those who justifiably rely on government action – even when that action is in effect a failure to act – when that action (or inaction) has induced persons to invest in property that the government later takes. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (federal government's creation of public right of access to Kuapa Pond violated Fifth Amendment absent just compensation, since government agency had awarded permit and permitted extensive investment in project before demanding free public access). Government action, or in some cases, government failure to correct the impression government has given a private party, "can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over management of the landowner's property." *Id.* at 179 (citations omitted). Property rights are thus protected when the government induces investment in that property, even if the government makes no express contract or other promise to induce the investment. *Id.*

That is precisely what has happened in this case. Between 1975 and 1999, the State of South Carolina permitted – and in some instances, required, through its regulations – private parties to invest in what was an

entirely legal means of public entertainment. During that period of time, through legislative pronouncements and court rulings, the State gave its official sanction to a course of action that included purchasing equipment, investing in land and buildings, setting up business entities, hiring personnel, acquiring licenses, acquiring State-mandated sophisticated equipment to permit State monitoring, and paying taxes. Certainly, the persons who took these actions were not on a "fool's errand." Instead, they took these actions with the understanding that the State had made this form of gaming legal and had set up a regulatory framework in which the industry was to operate within the law. For the State to require these persons to bear the entire economic brunt of the State's abrupt change in policy violates well-established principles of takings jurisprudence.

In short, this case presents an example of the harm that results when a state views its police power as unlimited. As Richard Epstein has pointed out, "[t]he police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the [takings] clause." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* at 109 (Harv. Univ. Press 1985). Instead, the police power has limits, and this case illustrates where those limits are found: in arbitrary actions that contradict a prior course of government conduct upon which property owners have relied.

As will be set forth more thoroughly below, property rights were of paramount significance to the framers of the Constitution. These rights, and more particularly the takings clause of the Fifth Amendment, derived from equitable concepts rooted in the common law and in the principles of equity. While a government could, in certain

circumstances, "take" private property for public use, any law authorizing such action was void unless it provided for fair payment in return. This rule extended not just to physical "takings," but to other government action that diminished the owner's right to use the property and exercise dominion over it. In effect, the law recognized that "property" consisted of much more than just a piece of real estate or other tangible thing; it was viewed as a collection of rights, including the right of the owner to make appropriate legal use of that property, limited only by the law of nuisance. As James Madison put it in his essay on property: "as a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property, 1 *National Gazette*, Mar. 29, 1792, at 174 (Reprinted in 4 Letters and Other Writings of James Madison 480 (1865). If a government takes one of those rights – one of those sticks in the "bundle of sticks" called "property" – it takes something that belongs to the owner.

In this case, after inducing those in the industry to invest in a legal enterprise, the State of South Carolina has unquestionably taken their property, and has done so without making any attempt to compensate the owners for their "investment-backed" expectations. In this way, the participants in the video gaming industry have unfairly and illegally borne the entire and costly burden of the State's policy shift. This is precisely what the Fifth Amendment's "takings" clause was designed to prevent. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A. The Equitable Basis for "Takings" Jurisprudence Provides a Historical Context for Evaluating a Government's Action Pursuant to the Police Power.

At the time it was proposed and adopted, the "takings" clause of the Fifth Amendment did not express any novel theory of rights. Instead, it merely recognized what was viewed by the framers as a fundamental principle of the common law: that the law should protect persons in the use and enjoyment of their property. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wisc. L. Rev. 67 (Feb. 1931).[4] Accordingly, although the majority of the original thirteen states had no constitutional prohibition against a government "taking," the courts of those states still found authority, citing common law or "natural equity," for the principle that property should be protected from an uncompensated seizure by government. Grant, *supra*, 6 Wisc. L. Rev. at 71.

The protections afforded by this understanding of property rights were broad. For example, when the State of New York enacted a statute outlawing dams across any creek or river flowing into one of the Great Lakes unless

---

[4] While ethicists now criticize the "natural law" underpinnings of Enlightenment thinking, the Enlightenment's "traditional" theory of rights can be justified when analyzed according to a process that is "aimed . . . at showing that rights are grounded in the normative claims inherent in the basic subject matter of ethics – human action. This normative theory of action is then connected with or explicated over an entitlement theory of distributive justice that characterizes the world in terms of holdings or property and goes on to explain how those holdings arise or come to be attached to particular people or institutions, either legitimately or illegitimately." Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 Harvard Journal of Law and Public Policy 165, 173-74 (1983).

the dam provided a slope for salmon, the New York Supreme Court ruled that the statute was illegal as it applied to a particular dam situated on a nonnavigable stream, both because it impaired a contract and because it violated the owner's vested right to the use of his property without offering any compensation for his compliance with the statute. *People v. Platt*, 17 Johns. 195, 215 (N.Y. 1819); *see also Bradshaw v. Rodgers*, 20 Johns. 103 (N.Y. 1822) (Any law violating a fundamental principle of government, that is, that government may not take private property without paying compensation, "must be deemed a nullity, as it is against natural right and justice.").

Moreover, in another case, to the argument that the applicable constitution was silent on the subject, the Supreme Court of New Jersey replied:

> The right to take private property for public use, does not depend on constitutional provisions, but is one of the attributes of sovereign power. . . . This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle. . . .
>
> And Story, calls the provision on this subject, in the constitution of the United States, merely 'an affirmance of a great doctrine established by the common law.' This principle of public law, has been made by express enactment, a part of the Constitution of the United States; . . . but it has been decided that as a constitutional provision, it does not apply to the

> several states. Still, if the opinions of the above distinguished jurists be correct, it is operative as a principle of universal law; and the legislature of this State, can no more take private property for public use, without just compensation, than if this restraining principle were incorporated into, and made part of its State Constitution.

Sinnickson v. Johnson, 17 N.J.L. 129 (1839) (citations omitted); *see also Petition of Mount Washington Road Co.*, 35 N.H. 134 (1857) (finding that, even though New Hampshire Constitution did not contain a "takings" provision, there was no intention to repudiate "the well established maxim of universal law, that private property cannot be taken for public use without just compensation to the owner"); *Young v. McKenzie*, 3 Ga. 31 (1847) ("takings" clause of federal constitution did not create "new principle of restriction," but rather "declare[d] great common law principle . . . which has existed from the time of Magna Carta . . . . ").

This Court has also recognized the inherent equitable underpinnings of the "takings" provision. As noted in *Fuller v. United States*, "[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law." 409 U.S. 488, 490 (1973) (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1970). In short, the right of an individual to own and enjoy property is one of the fundamental rights on which our system of law and government rests. When we, as the governed, delegate powers to the government, we do so with the fundamental understanding that the government has only limited powers with respect to our property. The rights we have to our property are, in essence, a premise of our compact with government, rather than a result of that compact.

Thus, the rights inherent in the ownership of private property are at the very core of a free society. Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 Harvard Journal of Law and Public Policy 165, 170 (1983). As John Locke noted, all human rights can be viewed as matters of property. *Id.* at 172 (citing John Locke, *The Second Treatise of Government* § 123 (rev. ed. P. Laslett ed. 1965). According to this view,

> the free society is a society of equal *rights*: stated most broadly, the right to be left alone in one's person and property, the right to pursue one's ends provided the equal rights of others are respected in the process, all of which is more precisely defined by reference to the property foundations of those rights and the basic proscription against taking that property. And the free society is also a society of equal *freedom*, at least insofar as that term connotes the freedom from interference that is described by our equal rights.

Pilon, *supra*, at 175 (emphasis in original).

Hence, more than a century before *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), the New York Supreme Court understood that the common law of eminent domain would require compensation for what was essentially an exercise of the state's "police power" to protect salmon, insofar as that exercise interfered with the Platt's right to operate a mill on his property. *People v. Platt*, 17 Johns. at 215. As the court there noted:

> Private property may, in many instances, be appropriated to public use; but such appropriations are constitutional, legal, and justifiable, only when a fair and just equivalent is awarded to the owner of the property thus taken. In the present case, no equivalent is offered, or provided, for the loss which must inevitably ensue,

> upon a compliance with the requirements of the statutes on which the indictment is founded.

Id. In this way, the New York Supreme Court recognized the appropriate limits on the legislature's pre-twentieth century "regulatory" taking: what might have been accomplished if fair compensation had been awarded could not be accomplished in the absence of such. There is no rational basis for applying a different standard to the South Carolina Legislature's action in this case.

B. Property Rights Encompass All Non-Nuisance Uses that May be Made of the Property.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), this Court agreed that state property rights can be defined by reference to traditional "background principles of property law, such as state law." In South Carolina's traditional principles of property law, "property" is defined broadly. As the South Carolina Supreme Court has described it,

> [t]he term 'property' is, in law, a generic term of extensive application. It is a term of large import, of broad and exceedingly complex meaning, of the broadest and most extensive signification, a very comprehensive word, and is most comprehensive of all terms which can be used. The term is often called 'nomen generalissimum,' and is employed to signify any valuable right or interest protected by law, and the subject matter or things in which rights or interest exist.

Lott v. Claussens, Inc., 163 S.E.2d 615, 617 (1968).

Applying these concepts, when addressing the scope of an interference with a person's property rights, a court should look to the rights the person had in his or her property at the time he or she acquired title to such

property. For the purposes of this Petition, the rights obtained when title to a video gaming machine was acquired included the right to use that machine legally as a source of business income. Video gaming, more specifically, video poker machines, have been legal in South Carolina for at least 25 years, beginning in 1975, when the South Carolina General Assembly determined that the operation of coin-operated video gaming machines with a free-play feature was lawful in South Carolina. S.C. Code Ann. § 16-19-60 (Law. Co-op. 1976). Since then until this year, the courts of South Carolina upheld the legality of video gambling, so long as cash payouts from these types of machines were paid out by the machine's owner, rather than the machine. *See, e.g., State v. Blackmon*, 403 S.E.2d 660 (1991).

As a result of the legislative enactments and court rulings, those who participated in the video gaming industry did so with the expectation that the rights acquired with the property purchased included the right to permit the public to lawfully use those machines for the purpose they were designed. In reliance the law as it existed at the time, persons invested in video gaming machines, in the land and facilities for housing those machines, and in the other appurtenances necessary for operating as a lawful business, including equipment and licenses required by the State of South Carolina as part of the regulations governing the industry.

There is no doubt, therefore, that owners of video gaming equipment in South Carolina had vested property rights in that equipment and in the facilities that housed it, and that those property rights included the right to permit public use of the equipment for the purpose for which it was designed. The question is not, therefore, whether the State of South Carolina has interfered with

the rights of the video gaming owners' to their property; it has unquestionably done so, and that interference has been substantial. Instead, the question is whether the State could, in the exercise of its police power, declare video gaming illegal and thereby circumvent the Fifth Amendment limitations on its power.

C. Video Gaming Property Is Not Subject to Uncompensated Seizure as A "Nuisance."

There is a valid "nuisance" exception to the "just compensation" requirement. A property owner may not use his or her property in a way that injures his neighbor, that is, he may not create a "nuisance." If he does so, then the state may exercise its "police power" to enforce the public good. *See, e.g., Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (government could order property owners to cut down cedar trees that were contaminating neighbor's apple trees without paying compensation). A government's police power should not be defined too broadly, however. It is, as John Locke put it, the "Executive Power" to secure our rights, which each of us has in the state of nature, before we yield it up to the state to exercise on our behalf. *See* John Locke, The Second Treatise of Government, *Two Treatises of Government* 13 (Peter Laslett ed., 1960). "The police power as a ground for legitimate public intervention is, then, exactly the same as when a private party acts on its own behalf." Epstein, *supra* at 111. In other words, if property were being used in a way that creates a nuisance, a neighbor affected by that nuisance could seek redress in the courts. Likewise, the State could, in the exercise of its police power, act to abate a nuisance even if no neighbor chose to do so. However, South Carolina cannot, merely by invoking the

words "police power," act to affect property rights in a way that no citizen could properly act.

Thus, South Carolina unquestionably had the power, at one time, to prohibit video gaming from entering the State. If it had taken that path, the persons who over the years have relied on the legality of the machines would not have invested their money and energy into what was, for them, a source of livelihood. A video gaming machine would have, in that event, occupied the same status as a slot machine, legal in some states or some parts of some states, but illegal in South Carolina, and anyone who purchased one for use in South Carolina would have had fair warning of what to expect by way of the State's reaction.

South Carolina did not take that path, however. In fact, the steps taken by the South Carolina legislature over the years, which included authorizing county referenda on the subject pursuant to which voters in some thirty-four of forty-six counties affirmed their desire for video gaming, led participants in the industry to believe that the activity would continue to be a legal and regulated, at least in some counties, aspect of South Carolina life. (*See, e.g.*, Affidavit of James Ronald White at ¶ 7.) As a result, when the State turned 180 degrees in the opposite direction, the persons who have invested in video gaming machines, who have devoted space on their property to housing the machines, who have purchased licenses for the machines, and who had paid taxes on the machines over the years have had their property rendered worthless, declared "contraband" and seized. This result goes far beyond what is permissible under any just theory of property rights and police power. In short, while government may properly exercise its police power to abate a nuisance, it may not, through its actions,

induce persons to engage in the very conduct that it later decides to label a "nuisance" without incurring liability for a "taking."

Moreover, in light of the national statistics on gambling, cited above, any attempt to label any single form of gambling as a "vice," subject to summary treatment under the police power, is doomed to failure. *See generally Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173, 187 and n.5 (1999) (reviewing statistics on legal gambling, noting that federal policy toward gambling no longer consistent). There is no logical reason why it is acceptable for someone to play bingo at the South Carolina state fair or in a church parlor, to drive to North Carolina to visit a casino, or to visit Georgia to buy a lottery ticket, while it is not acceptable to spend a few dollars at a video poker machine.

Given that video gaming has been legal in South Carolina until just recently and given the other forms of gaming permitted by the State, at the very least, the State Legislature should have identified the reasons why it was singling out video gaming for such precipitous treatment. Instead, the Legislature adopted the illegalization of video gaming as a "fall-back" position, to become law only in the event no referendum on video gaming was held. Consequently, it gave little consideration to the Constitutional implications of its actions, and made no provision for justly compensating those who were to bear the burden of the State's 180 degree turn on the question.

In short, Act 125 destroyed property rights by legislative fiat, taking what had been entirely legal and acceptable one day and declaring it illegal and unacceptable the next. In effect, instead of acting merely to abate a true "nuisance," the State assumed the power to declare that

an activity that had heretofore been legal was a "nuisance" and then acted to abate it. When viewed in light of Lockean principles, this is an invalid exercise of the police power, since no single citizen could have employed these means to affect the petitioners' property rights.

Moreover, to follow the nuisance analogy one step further, any single citizen who had encouraged a neighbor to use his or her property in a certain way and who then decided to label that use a "nuisance" and bring an action for abatement would not likely find a friendly reception in a court of equity. Nor should the State of South Carolina's action be viewed any differently. The takings clause of the Fifth Amendment protects against such arbitrary invocations of the police power. It protects those who, like Petitioners, justifiably rely on government action when making an investment, then whose property is destroyed when government reverses course.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court grant the Petition for Writ of Certiorari.

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No. 00-433

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., et al.,

Petitioners,

v.

ROBERT M. STEWART, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The South Carolina Supreme Court

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF R.L. JORDAN OIL COMPANY OF NORTH CAROLINA, INC. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, *amicus curiae* R.L. Jordan Oil Company of North Carolina, Inc. moves for leave to file the accompanying brief *amicus curiae*.

The petitioners in this matter have consented to the filing of this brief *amicus curiae*. The petitioners' consent letter has been filed with the Clerk of this Court. *Amicus curiae* has sought the consent of the respondents, through their counsel, the South Carolina Attorney General. However, the Office of the Attorney General has informed *amicus curiae* that its position is neither to consent to nor to oppose the filing of this brief *amicus curiae*. Therefore, it appears necessary to file this Motion for Leave to File Brief *Amicus Curiae*.

Amicus curiae is a South Carolina corporation that, in conjunction with its affiliated companies, owns and operates sixty-one (61) convenience stores in the States of South Carolina, North Carolina and Georgia. *Amicus curiae* owned, prior to the effective date of Act 125, approximately five hundred seventeen (517) video gaming machines similar to those owned by the petitioners. Because Act 125 declared such video gaming machines to be illegal contraband, effective as of July 1, 2000, *amicus curiae* has lost substantial amounts due to the loss in value of these machines and the loss in value of buildings that were constructed to serve as casinos for these machines. *Amicus curiae* initiated an action, similar to the petitioners', against the State of South Carolina on September 17, 1999, which alleges, among other things, that

the promulgation of Act 125 resulted in an unconstitutional taking of its property without just compensation in violation of the Fifth Amendment to the United States Constitution. This action has yet to reach trial in the State circuit court.

Amicus curiae is informed and believes that, while it is similarly situated to the petitioners, it is substantially larger than either of the petitioner corporations, insofar as *amicus curiae* currently owns or previously owned sixty-one (61) convenience stores, thirteen (13) casinos and five hundred seventeen (517) video gaming machines. Consequently, it believes that it will be able to provide a unique perspective to the Court regarding the impact of Act 125 on *amicus curiae*, its employees and the consumers of the State of South Carolina. *Amicus curiae* respectfully requests that the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Joytime Distributors & Amusement Co. v. State of South Carolina, No. 25007, 1999 WL 969280 (S.C. Oct. 14, 1999), *cert. denied*, 120 S.Ct. 1719 (2000) 2

CONSTITUTIONS

U.S. Const. amend. V.....2, 9

STATUTES

Act 125, 1999 S.C. Acts 1319..... 1, 2, 6, 7, 8

INTEREST OF *AMICUS CURIAE*[1]

As indicated in its Motion for Leave to File Brief *Amicus Curiae, amicus curiae* R.L. Jordan Oil Company of North Carolina, Inc. ("Jordan Oil") is a South Carolina corporation that, along with its affiliated companies, owns and operates sixty-one (61) convenience stores in the States of South Carolina, North Carolina and Georgia. Prior to the July 1, 2000 effective date of Act 125, Jordan Oil owned five hundred seventeen (517) video gaming machines and thirteen (13) casinos that were operated in South Carolina in compliance with prior statutory law and applicable Department of Revenue regulations. By virtue of the promulgation of Act 125, all of Jordan Oil's video gaming machines were declared to be illegal contraband and all of its casinos were forced to close (including five (5) casinos that were never allowed to open due to the retroactive application of certain provisions of Act 125). Consequently, Jordan Oil has suffered substantial losses totaling approximately $4,597,800 in diminution in the value of its real and personal property, and other losses as well. Jordan Oil has initiated an action against the State of South Carolina that is similar in substance to the petitioners' action below, and which alleges that the promulgation of Act 125 has resulted in an unconstitutional taking of Jordan Oil's property without just

---

[1] No counsel for any party authored this brief *amicus curiae*, either in whole or in part, and no persons other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

compensation as prohibited by the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Act 125 was signed into law by the Governor of the State of South Carolina on July 2, 1999. By virtue of the South Carolina Supreme Court's decision in *Joytime Distributors & Amusement Co. v. State of South Carolina*, No. 25007, 1999 WL 969280 (S.C. Oct. 14, 1999), *cert. denied*, 120 S.Ct. 1719 (2000), Act 125 outlawed video gaming in South Carolina, effective July 1, 2000. Act 125 also retroactively outlawed video gaming casinos that were not fully licensed and operational by May 31, 1999.

For approximately twenty-four (24) years prior to the promulgation of Act 125, South Carolina statutory law and Department of Revenue regulations had authorized the operation of video gaming machines within the State of South Carolina. These laws, regulations and other actions of State officials encouraged the investment by Jordan Oil and other businesses of substantial sums of money on appropriate types of video gaming machines and other equipment, and on the construction of video gaming casinos that complied with applicable regulations. By virtue of the promulgation of Act 125, the State of South Carolina has rendered such investments virtually worthless and has denied Jordan Oil and others their private property rights without just compensation as prohibited by the Fifth Amendment to the United States Constitution.

ARGUMENT

Amicus curiae R.L. Jordan Oil Company of North Carolina, Inc., like the petitioners in this matter and numerous other businesses in South Carolina, has been dramatically impacted by the promulgation of Act 125, which, effective July 1, 2000, banned the operation or possession of video gaming machines in South Carolina. As a convenience store owner and operator, Jordan Oil, like the petitioners, lawfully operated video gaming machines for many years and made substantial investments in this part of its business. These video games allowed many convenience stores, including some of Jordon Oil's stores, simply to stay in business. As a result of Act 125's ban on video gaming machines, Jordon Oil and others have suffered severe losses in the value of both their real and personal property.

Jordan Oil and its predecessor entities were founded by Mr. Robert L. Jordan and date back to the 1950s. Mr. Jordan served in the Army during the Korean War and was stationed in Japan. He sent one-half of his pay back to his parents in the United States to help support them. Upon his return from service, Mr. Jordan discovered that his parents had saved the money that he had sent home and wanted him to have it. Mr. Jordan used this money to purchase a convenience store in Franklin, North Carolina in the 1950s. Affidavit of Wilton Jordan at ¶ 2 (App. at 7A).

Shortly after opening the Franklin store, Mr. Jordan determined that he could transport gasoline to his station himself, instead of paying someone else approximately

$0.05 per gallon to do it. He ended up transporting gasoline to a number of other stations, in addition to his own. *Id.* at ¶ 3 (App. at 7A). He eventually earned enough money to buy a second convenience store, and then additional stores. *Id.* at ¶ 4 (App. at 7A). In the 1960s, Mr. Jordan introduced self-service gasoline to South Carolina. *Id.* at ¶ 5 (App. at 7A).

During the oil crisis of the early 1970s, Mr. Jordan's business nearly lost everything. The majority of the gas stations he supplied went out of business. He was also forced to close many of his own stores. *Id.* at ¶ 6 (App. at 8A). The company survived, however, and today owns and operates sixty-one (61) convenience stores in South Carolina, North Carolina and Georgia. *Id.* at ¶ 7 (App. at 8A).

Mr. Dan B. Durbin is the president of the company and has been with Jordan Oil since 1981. Affidavit of Dan B. Durbin at ¶ 1 (App. at 1A). Four of Mr. Jordan's five children are also employed full-time by the company and hold various management positions within the company. Affidavit of Wilton Jordan at ¶ 8 (App. at 8A).

Jordan Oil first operated video gaming machines in its South Carolina stores in 1983. At that time, Jordan Oil operated video games that were owned by third parties and would share the profits from the games with the owners, usually on a 50%-50% basis. Before Jordan Oil added video games to its stores, it had basically been a "break even" company, which made enough money to stay in business. The video games allowed Jordan Oil to become profitable on a more consistent basis. Affidavit of Dan B. Durbin at ¶¶ 2, 3 (App. at 1A).

In about 1994, Jordan Oil began purchasing some of its own video gaming machines, at a cost of about $3,500 per game. Jordan Oil's management decided to increase its investment in video games, in part, because many of its competitors had been operating video games in their stores and had put Jordan Oil at a competitive disadvantage. These competitors were able to draw customers away from Jordan Oil not only by offering video games, but also by charging lower prices on other products such as milk and gasoline and offsetting their lower margins with video game profits. *Id.* at ¶ 4 (App. at 1A-2A).

In the mid-1990s, the South Carolina Department of Revenue ("DOR") began planning a system to monitor all video gaming machines throughout the State, by requiring that they all be linked into a central monitoring system which was intended to allow the State to monitor revenues and payouts from video gaming machines. In order to comply with the State's regulations, video game operators were going to be required to purchase a certain type of video gaming machine that had the capacity to link into this system, as well as controllers (modems) that would actually link the games to the system. *Id.* at ¶¶ 5, 6 (App. at 2A).

The video games that Jordan Oil had purchased prior to the development of this DOR monitoring system did not have the required features to allow them to link into the system. Because Jordan Oil understood that its games would no longer be allowed under the new monitoring regulations, it began to sell its existing games (for which it had paid about $3,500 each) for about $1,500 to $2,000 per game. In all, Jordan Oil sold about one hundred (100) of these games. *Id.* at ¶ 7 (App. at 2A-3A).

Jordan Oil began purchasing video games that would comply with the new monitoring regulations. These games cost substantially more than the original games, approximately $7,500 each. The more expensive games were *not* any more profitable than the original games, and the only reason Jordan Oil invested the money in these games was because it believed that these games would be required under the new DOR regulations. Jordan Oil ultimately purchased approximately 517 of these more expensive games. Jordan Oil also purchased some of the controllers that were required to link the games into the State system, at a cost of about $17,000. *Id.* at ¶¶ 8, 9 (App. at 3A).

Ultimately, the State never fully implemented the monitoring system before declaring video gaming illegal under Act 125. Consequently, all of the controllers that Jordan Oil had purchased were rendered absolutely worthless, and the additional money Jordan Oil had invested in the more expensive games was wasted. The market value of these games has been reduced by approximately $5,400 per game by virtue of the impact of Act 125, because none of the prospective purchasers for these games has a need for the monitoring capacity that these games have. Consequently, Jordan Oil has lost approximately $2,791,800 ($5,400 x 517) on the fair market value of its video games which it has been forced to relocate or sell since the effective date of Act 125. *Id.* at ¶ 10 (App. at 3A-4A).

Jordan Oil also constructed 13 video gaming casinos during the late 1990s. The DOR issued regulations describing the specifications that were required for casinos. For example, every separate game room had to

be fully enclosed and had to have an electrical meter hooked up to it. Each room could hold up to 5 games. Under the DOR regulations, therefore, casinos were required to be constructed with a number of small, separate rooms, which made the buildings unsuitable for anything other than the operation of casinos. After each casino was constructed, the DOR would send an inspector to the site to confirm that the building complied with the DOR regulations. *Id.* at ¶¶ 11, 12 (App. at 4A).

Because of the ban on video gaming in Act 125 and the unsuitability of the casino structures for other uses, the fair market value of Jordan Oil's casino real estate has been reduced by approximately $1,789,000. Jordan Oil has made efforts to sell or lease these buildings, but has had no success, with the exception of one building that it has leased for less than fair market value. *Id.* at ¶ 11 (App. at 4A).

Five of Jordan Oil's 13 casinos were never allowed to fully open by virtue of Act 125. At these 5 locations, Jordan Oil had completed construction of the casinos, including the parking lots and signage, and had obtained all necessary permits except for the establishment licenses which had to be issued by the DOR. Jordan Oil applied for these establishment licenses prior to May 31, 1999 but was not issued the licenses until after May 31, 1999. Act 125, which was signed into law by the Governor on July 2, 1999, made all casinos illegal unless they had been fully licensed and operational prior to May 31, 1999. Because of the *retroactive* application of this law, Jordan Oil was never allowed to open these 5 casinos for which it had already invested the construction and other start up costs. Jordan Oil lost approximately $1,191,672 in

profits from July 1, 1999 to June 30, 2000 by not being allowed to open these casinos prior to the ban going into effect on July 1, 2000. *Id.* at ¶ 13 (App. at 4A-5A).

During the mid and late 1990s, Jordan Oil was able to expand its operations by virtue of the revenue generated by its video games. Jordan Oil opened new convenience stores, and opened restaurants (such as Subway sandwich shops) in 26 of its stores. These restaurants were generally not profitable on their own, and would not have been opened without the revenue available from Jordan Oil's video games. By virtue of its expansion, Jordan Oil was able to employ approximately 1200 employees during the late 1990s. *Id.* at ¶ 14 (App. at 5A).

Due to the additional revenue generated by its video gaming machines, Jordan Oil was also able to charge less for its other convenience store products, such as gasoline and milk. For example, Jordan Oil's profit margin on gasoline during the mid and late 1990s was generally only about 50% of its historical profit margin on gasoline. *Id.* at ¶ 15 (App. at 5A-6A).

Since Act 125 went into effect on July 1, 2000, Jordan Oil has been forced to close all of its casinos and 13 of its 26 restaurants. Jordan Oil has also been forced to lay off employees. Presently, Jordan Oil employs about 800 employees, compared to 1200 approximately two years ago. As a result of Act 125's ban on video gaming, a number of Jordan Oil's stores are presently losing money and probably will continue to lose money for the foreseeable future. Jordan Oil has 4 stores now which are losing so much money that they will have to be either closed

down or sold within a short period of time. *Id.* at ¶¶ 16, 17 (App. at 6A).

Since 1983, Jordan Oil made all of its investments in video games, related equipment and video game casinos in good faith reliance on existing and proposed laws and regulations of the State of South Carolina. Jordan Oil operated its video games in full compliance with such laws and regulations. *Id.* at ¶ 2 (App. at 1A). By declaring such games to be illegal contraband, the State of South Carolina has taken property of Jordan Oil and many other convenience store owners without just compensation as prohibited by the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 20, 2000

STATE OF SOUTH CAROLINA) AFFIDAVIT OF
)
COUNTY OF SPARTANBURG) DAN B. DURBIN

I, Dan B. Durbin, being duly sworn, depose and state as follows:

1. I am the President of R.L. Jordan Oil Company of North Carolina, Inc ("Jordan Oil"), which, along with its affiliated companies, owns and operates 61 convenience stores in South Carolina, Georgia and North Carolina. I have worked for Jordan Oil since 1981.

2. In about 1983, Jordan Oil first installed video poker games in several of its convenience stores. These games were owned by third parties, and Jordan Oil would share the profits from the games with the game owners, usually on a 50%-50% basis. From 1983 until July 1, 2000, Jordan Oil operated its games in compliance with applicable State laws and regulations.

3. Before Jordan Oil added these video games to its stores, the company had generally been a "break even" company, which basically made enough money to keep it in business. With the additional revenue generated by the video poker games from 1983 on, Jordan Oil was able to become profitable on a more consistent basis.

4. In about 1994, Jordan Oil began purchasing some of its own video poker games, at a cost of about $3,500 per game. Jordan Oil's management decided to increase its investment in video games, in part, because

many of its competitors had been operating video games in their stores and had put Jordan Oil at a competitive disadvantage by drawing away customers. On information and belief, these competitors were able to draw customers not only by offering video games, but also by charging lower prices on other products and offsetting their lower margins with video game profits.

5. In the mid-1990s, the South Carolina Department of Revenue ("DOR") began planning a system to monitor all video poker games throughout the State, by requiring that they all be linked into a central monitoring system. On information and belief, this system was intended to allow the state to monitor revenues and payouts from video poker games.

6. In order to comply with the regulations that the State was developing for its monitoring system, video game operators were going to be required to purchase a certain type of video game that had the capacity to link into this system, as well as controllers (modems) that would actually link the games to the system.

7. The video games that Jordan Oil had purchased prior to the development of this DOR monitoring system did not have the required features to allow them to link into the system. Because Jordan Oil understood that its games would no longer be allowed under the new monitoring regulations, it began to sell its existing games (for which it had paid about $3,500 each) for about

$1,500 to $2,000 per game. In all, Jordan Oil sold about 100 of these games.

8. Jordan Oil began purchasing video games that would comply with the new monitoring regulations. These games cost substantially more than the original games, approximately $7,500 each. The more expensive games were not any more profitable than the original games, and the only reason Jordan Oil invested the money in these games was because it believed that these games would be required under the new DOR regulations. Jordan Oil ultimately purchased approximately 517 of these more expensive games.

9. Jordan Oil also purchased some of the controllers that were required to link the games into the State system, at a cost of about $17,000.

10. Ultimately, the State never fully implemented the monitoring system before declaring video poker illegal under Act 125. Consequently, all of Jordan Oil's expenditures on controllers and the more expensive video games were rendered absolutely worthless. Based on my efforts to sell these games, I estimate that the market value of the more expensive games has been reduced by approximately $5,400 per game by virtue of Act 125, because no one else who would purchase these games has a need for the monitoring capacity that these games have. Consequently, Jordan Oil has lost approximately $2,791,800 ($5,400 x 517) in the fair market value of its video

games which it has been forced to relocate or sell.

11. Jordan Oil also constructed 13 video game casinos during the late 1990s. The DOR issued regulations describing the specifications that were required for casinos. For example, every separate game room had to be fully enclosed and had to have an electrical meter hooked up to it. Each room could hold up to 5 games. Under the DOR regulations, therefore, casinos were required to be constructed with a number of small, separate rooms, which made the building unsuitable for anything other than the operation of a casino. By virtue of the ban on video poker in Act 125, I estimate that the fair market value of Jordan Oil's casino real estate has been reduced by approximately $1,789,000. Jordan Oil has made efforts to sell or lease these buildings without success, with the exception of one building that it has leased for less than fair market value.

12. After each casino was constructed, the DOR would send an inspector to the site to confirm that the building complied with the DOR regulations.

13. Five of Jordan Oil's 13 casinos were never allowed to fully open by virtue of Act 125. At these 5 locations, Jordan Oil had completed construction of the casinos, including the parking lots and signage, and had obtained all necessary permits except for an establishment license which had to be issued by the DOR. Jordan Oil applied for these establishment licenses prior to May

31, 1999 but was not issued the licenses until after May 31, 1999. Act 125, which was signed into law by the Governor on July 2, 1999, made all casinos illegal unless they had been fully licensed and operational prior to May 31, 1999. Because of the retroactive application of this law, Jordan Oil was never allowed to open these 5 casinos for which it had already invested the construction and other start up costs. Furthermore, based on the revenues that were generated by Jordan Oil's other casinos during this time, I estimate that Jordan Oil lost approximately $1,191,672 in profits from July 1, 1999 to June 30, 2000 by not being allowed to open these casinos prior to the ban going into effect on July 1, 2000.

14. During the mid and late 1990s, Jordan Oil was able to expand its operations by virtue of the revenue generated by its video games. Jordan Oil opened new convenience stores, and opened restaurants (such as Subways) in 26 of its stores. These restaurants were generally not profitable on their own, and would not have been opened without the revenue available from Jordan Oil's video games. By virtue of its expansion, Jordan Oil was able to employ approximately 1200 employees during the late 1990s.

15. Due to the additional revenue generated by its video poker games, Jordan Oil was also able to charge less for its other convenience store products, such as gasoline and milk. For example, Jordan Oil's profit margin on

gasoline during the mid and late 1990s was generally only about 50% of its historical profit margin on gasoline.

16. Since Act 125 went into effect on July 1, 2000, Jordan Oil has been forced to close all of its casinos and 13 of its 26 restaurants. Jordan Oil has also been forced to lay off employees. Presently, Jordan Oil employs about 800 employees, compared to 1200 approximately two years ago.

17. As a result of Act 125, a number of Jordan Oil's stores are presently losing money, and I anticipate they will continue to lose money for the foreseeable future. Jordan Oil has 4 stores now which are losing so much money that they will have to be either closed down or sold within a short period of time.

Further affiant sayeth not.

_____

Dan B. Durbin

Sworn to and subscribed before me
This 18th day of October, 2000

_____

Notary Public for South Carolina
My Commission Expires:_____

STATE OF SOUTH CAROLINA) AFFIDAVIT OF
)
COUNTY OF SPARTANBURG) WILTON JORDAN

I, Wilton Jordan, being duly sworn, depose and state as follows:

1. My father, Robert L. Jordan, founded R.L. Jordan Oil Company of North Carolina, Inc. ("Jordan Oil"). I am employed by Jordan Oil as its Director of Construction and Engineering.

2. My father served in the Army and was stationed in Japan during the Korean War. While he was in the Army, he sent one-half of his pay home to his parents to help support them. When he returned home from service, he learned that his parents had saved all of the money he had sent home, and they gave it to him. In the 1950s, he used this money to purchase a convenience store in Franklin, North Carolina.

3. After operating his convenience store for some period of time, my father realized that he was paying about 5 cents per gallon for someone else to bring gasoline to his store. He decided that he could transport gasoline to his own store, and to other gas stations as well.

4. My father eventually made enough money to buy another gas station, and later built some of his own stores.

5. In the 1960s, my father introduced self-service gasoline in South Carolina.

6. During the gasoline crisis of the early 1970s, most of the gas stations that my father delivered gasoline to were forced to close down. My father was also forced to close many of his gasoline stations.

7. Today, Jordan Oil and its affiliates own and operate 61 convenience stores in South Carolina, Georgia and North Carolina.

8. Four of my father's 5 children, including myself, now work for Jordan Oil in management positions.

Further affiant sayeth not.

_____

Wilton Jordan

Sworn to and subscribed before me
This 18th day of October, 2000

_____

Notary Public for South Carolina
My Commission Expires:_____

MOTION FILED

OCT 20 2000

(5)

No. 00-433

In The

Supreme Court of the United States

WESTSIDE QUIK SHOP, INC., ET AL.,

Petitioners,

vs.

ROBERT M. STEWART, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF INGRAM INVESTMENTS, INC. AND HENRY E. INGRAM, JR.

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30 pp

QUESTION PRESENTED

Whether the South Carolina Supreme Court has violated the procedural due process rights of the petitioners and the *amici curiae* by violating or ignoring well established procedural rules, and by depriving them of adequate notice and an opportunity to be heard before rendering decisions on the merits in cases before it which substantially impaired the petitioners', and the *amici curiae*'s private property interests?

MOTION TO FILE BRIEF *AMICI CURIAE*

Ingram Investments, Inc. and Henry E. Ingram, Jr. respectfully petition this Court for leave to file the annexed brief *amici curiae*, in support of petitioners' petition for writ of certiorari, pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this *amici* brief. However, the Respondents have refused to consent to the filing of the *amici* brief.

Similar to that of petitioners, *amici*'s video gaming businesses were closed and *amici* were financially ruined when enforcement of Act No. 125 took effect on July 8, 2000. Also, like petitioners, *amici* have suffered numerous violations of their procedural due process rights in having their case heard before the Supreme Court of South Carolina and, as a result, will present additional information which would be helpful to this Court in its decision on petitioner's certiorari petition. Thus, *amici* hereby respectfully request this Court grant them leave to file a Brief, as *amici curiae*.

Respectfully submitted by:

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TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

MOTION FOR LEAVE TO FILE BRIEF..... 1

TABLE OF AUTHORITIES..... ii

IDENTITY AND INTERESTS OF *AMICUS CURIAE*... 1

SUMMARY OF ARGUMENT..... 2

ARGUMENT..... 5

I. The South Carolina Supreme Court Has Violated the Procedural Due Process Rights of Other Litigants in South Carolina's Video Poker Industry, Guaranteed By the United States Constitution, by Violating its Own Rules or Procedures and Improperly and/or Prematurely Seizing Jurisdiction Over Controversies Centered on the Constitutionality of Act No. 125..... 5

A. Respondents and the South Carolina Supreme Court violated every applicable mandatory rule they could in another video poker case, *Ingram v. Stewart*..... 8

B. These violations of the South Carolina Rules of Appellate Procedure are tantamount to due process violations of the United States Constitution..... 13

CONCLUSION..... 15

TABLE OF AUTHORITIES

Page

CASES:

Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) 14

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 14

Ingram Investments, Inc., TBHL, Inc. and Henry E. Ingram, Jr. v. Robert M. Stewart, Sr., in his capacity as Chief of the State Law Enforcement Division and Charles M. Condon, in his capacity as Attorney General for the State of South Carolina, Civil Action No. 2000-CP-27-189 ..... *passim*

CONSTITUTIONS:

U.S.C.A. Amend. XIV, § 1 13

RULES:

South Carolina Rules of Appellate Procedure, Rule 205 8

South Carolina Rules of Appellate Procedure, Rule 225 ..... 8, 11, 12, 14

South Carolina Rules of Civil Procedure, Rule 65 ..... 6, 7, 11

South Carolina Rules of Civil Procedure, Rule 4 7

BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of Court, *amici curiae* submit this brief in support of Petitioners' petition for a writ of certiorari.[1] Petitioners have consented to the filing of this brief.[2]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The *amici curiae* are Ingram Investments, Inc. and Henry E. Ingram, Jr.[3] Prior to July 1, 2000, Ingram Investments, Inc. operated video gaming devices in the State of South Carolina. It was the largest video game machine operator in the southeast region of the State of South Carolina and was the largest employer in rural Jasper County, South Carolina. Ingram Investments employed nearly 200 residents of South Carolina, nearly all of whom depend on the continued vitality of the video gaming industry for their economic livelihood. Henry E.

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[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this Brief.

[2] *Amici* have requested permission from respondents; they have refused. Accordingly, *amici* have filed a Motion for Leave to file this Brief, *supra*.

[3] Copies of the request for consent, along with the Petitioner's consent, are being filed with the Clerk of Court contemporaneously herewith. No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its counsel made any monetary contribution to the preparation or submission of this brief.

Ingram, Jr. is its principle stockholder.[4] Ingram Investments, Inc. had video poker machines seized by the respondents on July 2, 2000, suffered a total loss of many of its businesses, and terminated the employment of virtually all of its employees, all without compensation from the State of South Carolina when Act No. 125 was fully implemented on July 8, 2000.

The *amici curiae* have an interest in the present action because they endured similar constitutional deprivations in the South Carolina Supreme Court's effort to fast track the petitioners and the *amici curiae* out of business.

SUMMARY OF ARGUMENT

This *amici curiae* Brief is not intended to bolster the arguments which have already been clearly and thoroughly set forth by the petitioners in this case. Instead, *amici* seek to draw this Court's attention to serious procedural irregularities in another video poker case that has, similar to the case here, improperly found its way into the South Carolina Supreme Court for summary adjudication on an important procedural issue. The purpose of this Brief is not to seek any relief from this Court; rather, it is to provide additional perspective for this Court from which to consider the due process violations

[4] Ingram Investments, Inc. and Henry E. Ingram, Jr. are hereafter collectively referred to as "Ingram" throughout this brief.

perpetrated against the petitioners by the South Carolina Supreme Court as alleged in their Brief.

The South Carolina Supreme Court has similarly violated Ingram's constitutionally mandated due process rights as well as in connection with an action filed in the Jasper County, South Carolina Court of Common Pleas ("the trial court") in which Ingram challenges the constitutionality of Act No. 125. *Ingram Investments, Inc., TBHL, Inc. and Henry E. Ingram, Jr. v. Robert M. Stewart, Sr., in his capacity as Chief of the State Law Enforcement Division and Charles M. Condon, in his capacity as Attorney General for the State of South Carolina,* Civil Action No. 2000-CP-27-189.[1] Specifically, the South Carolina Supreme Court issued a hand written order of supersedeas staying the enforcement of a valid temporary restraining order Ingram obtained in the trial court on Friday, June 30, 2000 which enjoined the enforcement of South Carolina Act No. 125, and temporarily saved Ingram's businesses and its employees' livelihood.

The South Carolina Supreme Court, upon oral motion by the respondents, issued the Order of supersedeas (hereafter "the Order") in the late evening hours on Friday, June 30, 2000. The Supreme Court issued its Order based solely on a telephone call from the respondents placed several hours after the Court closed its doors for the weekend. Remarkably, at the time respondents moved by telephone for relief before the South Carolina Supreme Court, they did not have or present to the Court the

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[1] TBHL, Inc. is another Ingram owned video poker business.

pleadings upon which the trial court order was based, nor did they follow any of the mandatory procedural rules for petitioning the South Carolina Supreme Court for supersedeas. Nonetheless, the South Carolina Supreme Court granted the unsworn, oral motion of the respondents and issued the Order in respondents' favor.

The South Carolina Rules of Appellate Procedure provide safeguards that prevent private property interests from being adversely affected without basic procedural due process. Those rules were flagrantly disregarded by the respondents with the blessing and tacit cooperation of the South Carolina Supreme Court. A close examination of the present case, in conjunction with that of *Ingram v. Stewart* discussed in detail, *infra*, reveals the chilling reality that persons in the South Carolina video gaming industry, including the petitioners and Ingram, were swiftly bullied through the court system of South Carolina in a thinly veiled effort to abolish the video gaming industry "on time", i.e., by July 8, 2000. This was all accomplished in violation of the procedural due process rights of the petitioners, Ingram, and possibly others.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT HAS VIOLATED THE PROCEDURAL DUE PROCESS RIGHTS OF OTHER LITIGANTS IN SOUTH CAROLINA'S VIDEO POKER INDUSTRY, GUARANTEED BY THE UNITED STATES CONSTITUTION, BY VIOLATING ITS OWN RULES OF PROCEDURE AND IMPROPERLY AND/OR PREMATURELY SEIZING JURISDICTION OVER CONTROVERSIES CENTERED ON THE CONSTITUTIONALITY OF ACT NO. 125.

Tens of thousands of South Carolinians were employed in the video gambling industry prior to July 1, 2000. Act No. 125 not only abolished the billion-dollar video poker industry, it put thousands of its workers in the unemployment lines. The collateral effects of Act No. 125 are still unknown, but they will surely be substantial, and they will likely cause a tremendous financial burden on the State of South Carolina and the people who live there. With stakes such as these, the constitutional challenges to the Act, levied by the petitioners and Ingram, as well as others, were certainly anticipated by the respondents and the South Carolina judiciary. What was not anticipated, not by Ingram or the petitioners at least, is the peculiar procedural course through the South Carolina judiciary that these cases have followed. Both cases have found their way prematurely to the South Carolina Supreme Court where rulings on the merits have been made which, to say it mildly, have substantially impaired the property interests of these video poker plaintiffs.

Ingram will not attempt to improve upon the petitioners' clear and articulate arguments presented in their

brief; suffice it to say that Ingram is in accord with all issues contained therein. Instead, Ingram seeks in this brief only to provide some perspective for this Court so that it may fully appreciate the importance of the procedural due process violations perpetrated against the petitioners by the South Carolina Supreme Court that were alleged in the relevant portions of their brief. Towards that end, Ingram points out similar abuses of procedure and constitutional due process violations in *Ingram v. Stewart, supra,* another video poker lawsuit.

PROCEDURAL HISTORY

Ingram filed a lawsuit on June 30, 2000 against the respondents in the South Carolina Court of Common Pleas alleging that Act No. 125, which abolished video gaming in the state of South Carolina, violated the Contracts Clause of both the state and federal constitutions. Ingram also asserted claims for promissory estoppel, as well as civil rights violations perpetrated by these state officials. *See Ingram Investments, Inc., TBHL, Inc. and Henry E. Ingram, Jr. v. Robert M. Stewart, Sr., in his capacity as Chief of the State Law Enforcement Division and Charles M. Condon, in his capacity as Attorney General for the State of South Carolina.* Ingram filed the Summons and a verified Complaint in the South Carolina Court of Common Pleas, Jasper County at approximately 1:30 p.m. on Friday, June 30, 2000, the day before the ban on video poker became effective. That same day, Ingram properly moved, pursuant to Rule 65, S.C.R.C.P., for a temporary restraining order seeking a brief reprieve from the Act's provisions until a merits hearing could be held days later in the

lower court. Ingram's pleadings and motion for a temporary restraining order were reviewed and heard by the Honorable Circuit Court Judge Gerald Smoak on June 30, 2000 at approximately 3:00 p.m. just prior to his formal retirement from the bench. After considering the matter, Judge Smoak issued the temporary restraining order Ingram requested.[2] Thereafter, Judge Smoak's Order was filed with the Jasper County Clerk of Court, and it was that day served along with the Summons and Complaint upon the petitioners by certified mail, return receipt requested, in accordance with Rule 65 and Rule 4 of the South Carolina Rules of Civil Procedure.

At approximately 8:00 p.m. on June 30, 2000, Ingram sent a copy of Judge Smoak's Order to officials with the South Carolina Law Enforcement Division. At approximately 9:45 p.m., the Honorable Chief Justice Jean H. Toal with the South Carolina Supreme Court personally filed Smoak's Order. At 10:15 p.m., the Supreme Court entered the Order, hand written on two (2) sheets of notebook paper, which stayed the enforcement of Judge Smoak's Order.[3] The Order was faxed to counsel for Ingram at 11:21 p.m. It was after all of this that the respondents

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[2] Judge Smoak's order is attached as Appendix 1-2 and made a part of this Brief. It is the only document that the South Carolina Supreme Court had before it when it issued the Order discussed herein.

[3] The Supreme Court based its ruling in the Order on its holding in this case; however, no two claims in these actions are alike. The Supreme Court must have assumed, erroneously, that Ingram was also alleging a constitutional "takings" claim. He was not. The Order is attached and incorporated as Appendix 3-4.

served a Notice of Appeal of Judge Smoak's Order with the South Carolina Supreme Court.[4]

A. Respondents and the South Carolina Supreme Court Violated Every Procedural Rule Applicable to the Acquisition and Entry of the Order in Another Video Poker Case, *Ingram v. Stewart*.

The South Carolina Supreme Court promulgated the South Carolina Rules of Appellate Procedure, which were flagrantly violated by the respondents with the South Carolina Supreme Court's blessings in the case of *Ingram v. Stewart, supra*. Ordinary citizens of South Carolina have never been permitted to avail themselves of the short-circuited procedure that was used by the respondents in obtaining the Order. One only needs to compare the actual procedure required for obtaining a supersedeas in South Carolina with that used by the respondents to see the grave injustice to Ingram that occurred at their hands and those of the South Carolina Supreme Court. The South Carolina Rules of Appellate Procedure, Rule 225, governs the inquiry. Rule 225 provides, in pertinent part:

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[4] The Proof of Service [Appendix 6] is dated June 30, 2000. It certifies that service of the notice of appeal and the Order was accomplished simultaneously. Accordingly, because jurisdiction of the Supreme Court was not invoked until service of the notice of appeal was accomplished, and because the Order was already obtained by that time, the Supreme Court was without subject matter jurisdiction to hear or rule on respondents' motion, and to enter the Order. S.C.R.A.P., Rule 205 (*"Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction* * * *"*). Nevertheless, the Court did so.

(d) **Procedure for Obtaining Lift of Stay or Supersedeas.**

(1) Except where extraordinary circumstances make it impracticable, **an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court which entered the order on appeal.** The issuance of an ex parte order or an unnecessary delay by the lower court in ruling on this application shall constitute an extraordinary circumstance. (Emphasis added).

* * *

(3) A person seeking * * * a writ of supersedeas **must file a written petition verified by the client. The petition shall be captioned the same as the appeal. In addition to the petition and verification, the moving party must contemporaneously file a certified copy of the lower court's order and a copy of the notice of appeal with its proof of service.** (Emphasis added).

(4) The petition shall contain:

(A) the factual background necessary for an understanding of the petition. If the facts are subject to dispute, the petition shall be supported by affidavits or other sworn statements;

(B) the grounds for the petition, and legal arguments with supporting points and authority;

(C) a showing that an application for this relief was made to the lower court and was unjustifiably denied or that the relief granted failed to afford the relief which the petitioner requested. A certified copy of the lower court's

ruling must be included. If no application was made to the lower court, then the petition shall state the extraordinary circumstances which made it impracticable to make such an application.

(5) **The petition and accompanying documents shall be served on the opposing party(s).** Upon application to the full appellate court, one original and six copies, and a certificate of service shall be filed with the clerk of the appellate court. If the relief is sought from an individual judge or justice, the original and two copies must be filed with him. The individual judge or justice shall forward the original documents, including a copy of any order in the matter issued by him, to the clerk of the appellate court as soon as possible. (Emphasis added).

(6) **A supersedeas or order lifting the automatic stay may be issued ex parte only where exigent circumstances require that action be taken before there is time for a hearing. An ex parte order shall issue only if:** (Emphasis added).

(A) it clearly appears from specific facts **shown by affidavits or included in the verified petition** that immediate and irreparable injury, loss or damage will result before the opposing party can respond (Emphasis added); and

(B) **the moving party's attorney certifies in writing,** as an officer of the court, the efforts which have been made to give notice, or the reasons supporting the claim that notice should not be required. (Emphasis added).

> (7) Any party aggrieved by the decision of the lower court or an individual judge or justice may petition under this Rule for a review of that decision.

S.C.R.A.P., Rule 225.

It is readily apparent that none of the emphasized portions of Rule 225, set forth above, were obeyed by the respondents, nor was compliance required or requested by the Supreme Court, in their apparently joint efforts at obtaining and entering the Order. Respondents contend that the "extraordinary circumstances" presented in their case against Ingram somehow permitted an oral motion to the Court for supersedeas without any petition, affidavit, attorney certificate, or other supporting documentation.[5] This is nonsense. There were no "extraordinary circumstances." Respondents were entitled to a hearing in the trial court if they so chose within forty-eight (48) hours of the date and time of Judge Smoak's Order, perhaps earlier. *See* S.C.R.C.P., Rule 65. Rule 65 allowed for a hearing as early as Monday, July 3, 2000. Accordingly, respondents implicitly contend that it was an *emergency* that Ingram was permitted under the terms of Judge Smoak's Order to operate its machines in the same manner as it had for the last ten (10) years for *one additional day* without a merits hearing (video poker machines cannot operate legally in South Carolina on Sundays). These are not "extraordinary circumstances" and, even if

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[5] A letter dated July 3, 2000 [Appendix 7-8] from counsel for the respondents to Ingram's trial counsel details the chain of events concerning their acquisition of the Order.

they were, Rule 225 outlines a specific and simple mechanism by which respondents could have lawfully obtained a valid writ of supersedeas (if they were otherwise entitled to it) under the alleged "extraordinary circumstances." See S.C.R.A.P., Rule 225(d)(6).

The procedural mandates of Rule 225 were not followed by the respondents in *Ingram v. Stewart, supra,* because they could not be. Not because of time constraints or "extraordinary circumstances," but because they could not establish the requisite "immediate and irreparable damage" which they had to prove awaited them if Ingram was afforded an opportunity to respond to their motion. *See* S.C.R.A.P., Rule 225(d)(6)(A). Simply put, the respondents had no legal basis on which to obtain a supersedeas, so they sought the same from the South Carolina Supreme Court, and incredibly obtained it, by simply ignoring the mandatory procedural rules.

The South Carolina Supreme Court granted an unsworn, oral motion made by the respondents who, at the time their motion was made, had not even glanced at the complaint in the underlying action. It made no difference to the respondents what the effect of Act No. 125 was to Ingram and its employees; it mattered only that they immediately enforce the ban on video poker. In accomplishing their goal, the respondents commandeered the South Carolina Supreme Court, and they sought and obtained the Order which stayed the enforcement of a valid trial lower court order issued by a judge who carefully reviewed the facts of the case before him. The respondents justify their actions by claiming that the situation was "extraordinary."

Since that time, the Supreme Court has accepted the case in its original jurisdiction to fast track its way to demise. Ingram will not be afforded discovery or testimony. The case will die the same death in state court as the one pending before this Court. There is no doubt about it.[6] It is impossible to adequately express the dangerous precedent set by the South Carolina Supreme Court in *Ingram v. Stewart, supra*. The respondents, under color of state law, have accomplished the heretofore unaccomplishable. They persuaded the South Carolina Supreme Court, by telephone call, and not by notice, motion, briefing and argument, to stay the enforcement of a valid court order with neither the respondents nor the Supreme Court having ever reviewed the pleadings or considered merits of the case upon which the trial court's order was based.

B. These Violations of the South Carolina Rules of Appellate Procedure are Tantamount to Due Process Violations of the United States Constitution.

"[No state shall] deprive any person of life, liberty or property, without due process of law." U.S. Const. Amend. XIV, § 1. Ingram has a constitutionally protected property interest in his video gaming business; accordingly, due process mandates that his business not be

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[6] A startling footnote to the video poker saga is that the South Carolina Attorney General, a respondent here, asked the South Carolina Supreme Court to investigate Judge Smoak, the trial judge who granted the temporary injunction in favor of Ingram. Such conduct is unprecedented, just like all of the events in these cases.

stripped away or substantially impaired by governmental action without procedural safeguards. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000). At a minimum, these safeguards include notice of the proceedings, and an opportunity to be heard in a meaningful way. U.S. Const. amends. V, XIV. With respect to the focal inquiry in *Ingram v. Stewart, supra*, safeguards complying with due process requirements are found in the South Carolina Rules of Appellate Procedure, Rule 225; however, those rules were ignored by the respondents and the South Carolina Supreme Court. Respondents' side stepping of the procedural safeguards in place by orally moving before the Supreme Court for supersedeas, without notifying Ingram, and without making even a *prima facie* showing to the Court of their entitlement to the relief they sought and obtained, deprived Ingram of a protected property interest not only in his business, but also in the rights afforded him by the trial court's order.

The petitioners are no longer the only video poker operators who have been blind-sided by procedural irregularities in the South Carolina Supreme Court which have operated to deprive them of their private property interests. Ingram now shares with petitioners that dubious distinction. Viewing the case of *Ingram v. Stewart, supra*, in tandem with the present case before this Court, casts light on what is really going on in the State of South Carolina. Video poker was abolished unintentionally by our legislature without a vote by the people. Nonetheless, the respondents were determined to see that the industry was destroyed on schedule, i.e., by July 8, 2000, regardless of the deprivations of the gaming industry owners'

constitutionally protected due process rights. The South Carolina Supreme Court appears to have joined in the respondents' quest for expediency in spite of the serious constitutional issues that should properly have been addressed before this billion-dollar industry was destroyed overnight.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for Writ of Certiorari.

ANNE S. DOUDS*
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KIKER & DOUDS, P.A.
Post Office Box 2481
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(843) 986-1000
(843) 986-1002 (facsimile)

October 20, 2000.

**Counsel of Record for Amici Curiae*

RECEIVED – S.C. SUPREME COURT
By Jean H. Toal Chief Justice
at 9:45 p.m. June 30, 2000

STATE OF SOUTH CAROLINA COUNTY OF JASPER	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
INGRAM INVESTMENTS, INC.; TBHL, Inc. and HENRY INGRAM. JR., Plaintiffs, v. ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, In his official capacity as Attorney General for the State of South Carolina, Defendants.	C.A. NO.: 2000-CP-27-189 TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION (Filed June 30, 2000)

This matter came before me pursuant to a Complaint for Declarative and Injunctive Relief filed by the Plaintiffs on June 30, 2000. Upon reviewing the verified pleadings and applicable law, it appears that the Defendants intend to enforce the provisions against Act 125 against the Plaintiffs beginning on or about July 1, 2000. It further appears that if the Defendants are permitted to enforce

the provisions of Act 125 the Plaintiffs will suffer irreparable harm, that they have no adequate remedy at law, and that they have made out a *prima facia* case. Therefore a Temporary Restraining Order and Temporary Injunction should be issued.

Since this Temporary Restraining Order is being granted on an *ex parte* basis, it will stay in effect for a limited period of time. A further hearing should be held with notice to the Defendants to determine whether or not this Temporary Restraining Order and Temporary Injunction should remain in effect. At the present time I do not find that bond is necessary; however, if the Defendants desire that a bond be posted, this issue can be addressed at a subsequent hearing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED

a. That the Defendants are prohibited from enforcing the provisions of Act 125 against the Plaintiffs.

b. That a hearing shall be held on whether to continue this Temporary Restraining Order in force and effect on the 9 day of July, 2000 at 10:00 ___.m. and the Defendants are free to request an earlier hearing if they so desire and if said request can be accommodated by the Court's schedule.

IT IS SO ORDERED

/s/ Gerald C. Smoak
Presiding Judge
Fourteenth Judicial Circuit

June 30, 2000

Walterboro, South Carolina
Issued at 2:15 at Walterboro, South Carolina on June 30, 2000.

STATE OF SOUTH CAROLINA	)	C.A. No. 2000-CP-27-189
	)	
COUNTY OF JASPER	)	

IN THE SUPREME COURT OF SOUTH CAROLINA

Ingram Investments, Inc.; TBHL, Inc., and Henry Ingram, Jr.,

Plaintiffs,

vs.

Robert M. Stewart, Sr., et. al.,

Defendants.

CA. No 2000-CP-27-189

This matter comes before us by way of a motion for supercedeas of an order issued by the Hon. Gerald C. Smoak enjoining Defendants from enforcing Act 125. Defendants, by Robert M. Stewart and Robert Cook, move that we supercede and stay the order of Judge Smoak.

Based upon this court's rulings in *Joytime Distributors v. State*, 528 S.E.2d 647 (SC 1999) and *Westside Quik Shop, Inc. v. Stewart* 2000 WL 823346 (SC 2000), Defendants Stewart, et. al., are granted a supercedeas and stay and the order of the Hon. Gerald Smoak is stayed.

This matter shall be heard by petition and response to this Court, upon a schedule to be set by our order issued on or before July 6, 2000.

AND IT IS SO ORDERED

/s/ Jean H. Toal CJ
/s/ James E. Moore AJ
By Jean H. Toal
/s/ Costa M. Pleicones AJ

at Columbia
June 30, 2000
at 10:15 p.m.

Filed Jean H. Toal CJ

June 30, 2000

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Jasper County
Court of Common Pleas

Honorable Gerald Smoak, Circuit Court Judge

Case No.: 00-CP-27-189

Ingram Investments, Inc.; TBHL, Inc., and Henry Ingram, Jr. .....Respondents,

vs.

Robert M. Stewart, Sr., in his official capacity as Chief of the State Law Enforcement Division; Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina.....Appellants

---

NOTICE OF APPEAL

Chief Robert Stewart in his official capacity as Director of the South Carolina Law Enforcement Division and Charles M. Condon in his official capacity as Attorney General for the State of South Carolina appeal the Order of the Honorable Gerald Smoak, Dated June 30, 2000. A copy of this Order is attached. Appellants received notice of entry of the Order on June 30, 2000.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Jasper County
Court of Common Pleas

Honorable Gerald Smoak, Circuit Court Judge

Case No.: 00-CP-27-189

Ingram Investments, Inc.; TBHL. Inc., and Henry Ingram, Jr.....Respondents.

vs.

Robert M. Stewart, Sr., in his official capacity as Chief of the State Law Enforcement Division: Charles M. Condon, in his official capacity as Attorney General for the State of South Carolina.....Appellants

---

PROOF OF SERVICE

I, Christie Newman Barrett, certify that I have served the Notice of Appeal and Order Granting Motion for Supersedeas on Respondents by faxing and depositing one copy of the same in the United States mail, postage prepaid, addressed to Respondent's attorney of record as follows:

Jonathan Brent Kiker, Esquire
Anne S. Douds, Esquire
Kiker & Douds P.A.
P.O. Box 2481
Beaufort, SC 29901-2481

This 30th day of June, 2000.

/s/ Christie Newman Barrett
CHRISTIE NEWMAN BARRETT
South Carolina Office of the
Attorney General
Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3736
ATTORNEYS FOR APPELLANT

[SEAL]

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 3, 2000

VIA FACSIMILE AND REGULAR MAIL

Jonathan Brent Kiker, Esquire
Anne S. Douds, Esquire
Kiker & Douds P.A.
P.O. Box 2481
Beaufort, SC 29901-2481

Re: Ingram Investments, Inc.; TBHL, Inc., and Henry Ingram, Jr. v. Stewart et al. C.A. 00-CP-27-189

Dear Mr. Kiker:

I received a voice mail message from you today asking for a copy of our motion to supersede filed with the Supreme Court in the above referenced matter. Please be advised that our Office did not receive a copy of Judge Smoak's *ex parte* order granting a temporary restraining order until well after 8:00 p.m. on Friday, June 30, 2000. As you know, the enforcement of Act 125 was scheduled to begin at 12:01 a.m. on July 1, 2000, less than four hours later. Given the extraordinary circumstances presented by these time limitations, it was impossible to file a written motion with the Court. Therefore, an oral request for an emergency supersedeas was made to the South Carolina Supreme Court. A copy of the South Carolina Supreme Court's Order grating this request was faxed to your office at approximately 11:20 p.m. on June 30, 2000. An

attempt to reach you or Ms. Douds by telephone was not successful.

I am also enclosing and facing to you a copy of an order from the South Carolina Supreme Court dated July 3, 2000 directing your client to file a response setting forth why the Supreme Court's June 30, 2000 order should not remain in effect pending disposition of the action in lower court. This was sent by facsimile this morning to both your office and ours by the Clerk's office at the Supreme Court. This response should be personally served on our Office by 10:00 a.m. on July 5, 2000. Our office in turn must serve and file a response to your filing by 10:00 a.m. on July 6, 2000. Please call me at home (803 787-8473) on July 4, 2000 if you have any questions.

With kind regards, I remain

Very truly yours,

Jonathan Brent Kiker, Esquire
Anne S. Douds, Esquire
July 3, 2000
Page 2

/s/ Nathan Kaminski, Jr.
Nathan Kaminski, Jr.
Senior Assistant Attorney General

NKjr/kkf

Enclosure

cc: The Honorable Daniel E. Shearouse

(6)

Supreme Court, U.S.
FILED
OCT 30 2000
CLERK

No. 00-433

In The
Supreme Court of the United States
October Term, 2000

WESTSIDE QUIK SHOP, INC., et al.

Petitioners,

vs.

ROBERT M. STEWART, SR., et al.

Respondents.

On Petition for a Writ of Certiorari
To the South Carolina Supreme Court

Brief for the Respondents in Opposition

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31pp

QUESTION PRESENTED

South Carolina Act 125, which was enacted on July 1, 1999, banned video gaming and video gaming machines in the State as of July 1, 2000. The question presented is whether Act 125 caused a taking of petitioners' property for which just compensation is due under the U.S. Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

COUNTER STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 9

I. Well Established Principles Defeat Petitioners' Claim That Act 125 Would Unconstitutionally Take Their Video Poker Machines.. 9

II. The Court Below Properly Considered and Applied the "Per Se" Test of Lucas. 10

III. This Case Does Not Present Any Compelling Reason to Grant a Petition for Writ of Certiorari. 13

A. There is no important federal question decided below that conflicts with relevant decisions of this Court, a United States Court of Appeals, or another state court of last resort. 13

B. There was no departure in the court below from the accepted and usual course of judicial proceedings. 15

C. Petitioners failed to ask the court below for rehearing, a factor which may be considered by this Court in exercising its judicial discretion. 17

CONCLUSION 17

TABLE OF AUTHORITIES

CASES:

Ardis v. Ward, 467 S.E.2d 742 (S.C. 1996) 4

Bennis v. Michigan, 516 U.S. 442 (1996) 9, 10

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 9

Colorado Department of Health v. The Mill, 887 P.2d 993 (Colo. 1995), *cert. denied*, 515 U.S. 1159 (1995) 15

District Intown Properties Ltd. v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 68 U.S.L.W. 3670 (Oct. 2, 2000) 14

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 11

Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000) 13, 14

Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919) 10

Hammerstein v. Superior Court of California, 341 U.S. 491 (1951) 17

J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505 (1921) 9

Johnson v. Collins Entertainment Co., 508 S.E.2d 575 (S.C. 1998) 4

Johnson v. Collins Entertainment Co., Inc., 199 F.3d 710 (4th Cir. 1999) 3

Johnson v. DeGrandy, 512 U.S. 997 (1994) 12

Joytime Distributing & Amusement Co. v. State, 528 S.E.2d 647 (S.C. 1999), *cert. denied*, 120 S. Ct. 1719 (2000) 5, 15

Lawton v. Steele, 152 U.S. 133 (1894) 10

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7, 10, 12, 13, 14, 15

Martin v. Condon, 478 S.E.2d 272 (S.C. 1996) 3

Montjoy v. One Stop of Abbeville, Inc., 478 S.E.2d 683 (S.C. 1996) 4

Palazzolo v. Rhode Island, 746 A.2d 707 (R.I. 2000), *cert. granted*, 69 U.S.L.W. 3002 (Oct. 10, 2000) 14, 15

Palm Beach Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000) 14

Penn Central Transport Co. v. City of New York, 438 U.S. 104 (1978) 7

Powell v. Red Carpet Lounge, 311 S.E.2d 719 (S.C. 1984) 2, 3, 4

Ruckelshaus v. Monsanto Co, 467 U.S. 986 (1984) 12

State v. Blackmon, 403 S.E.2d 660 (S.C. 1991) 2, 3, 4

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 10

Van Oster v. Kansas, 272 U.S. 465 (1926) 9

Westside Quik Shop, Inc. v. Stewart, No. 25158 (filed June 12, 2000) 11, 16

CONSTITUTION:

U.S. CONST. amend I 6, 7

U.S. CONST. amend V 6

U.S. CONST. amend XIV 6

STATUTES:

FEDERAL:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1257(a) 1

42 U.S.C. § 1983 6

STATE:

S.C. Code Ann. § 12-21-2710 (West Supp. 1999) 3, 5, 6
S.C. Code § 12-21-2712 (West Supp. 1999) 6
S.C. Code Ann. § 12-21-2798 (West Supp. 1999) 4
S.C. Code Ann. § 16-19-60 (Law. Co-op. 1976) 1, 2, 3

LEGISLATIVE MATERIALS:

1975 S.C. Act No. 237, Part II, § 4 2

1982 S.C. Act No. 466, Part II, § 14 3

1993 S.C. Act No. 164, Pt. II, § 19H 3

1999 S.C. Act No. 125 ..... 5, 6, 7, 8, 9, 10, 11
Part I, § 1 5
Part I, § 2 6

COURT RULES:

Sup. Ct. R. 10 18

South Carolina Appellate Court:
Rule 221, SCACR 8, 17
Rule 229 16

OTHER:

1993 Op. S.C. Att'y Gen. 93-19 4

OPINION BELOW

The opinion of the South Carolina Supreme Court (Pet. App. 1A-11A) is not yet officially reported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on June 21, 2000. No petition for rehearing was filed.

The petition for a writ of certiorari was filed on September 19, 2000. The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1254(1) (*see* Pet. 1) but actually should have been invoked under 28 U.S.C. § 1257(a).

COUNTER STATEMENT OF THE CASE

In this case petitioners challenged a South Carolina statute that bans a type of gambling known as "video poker" (or "video gaming"), as well as the equipment associated with that activity. The South Carolina Supreme Court, exercising original jurisdiction, rejected petitioners' argument that the statute takes their property without just compensation and denied petitioners' request for injunctive relief. Petitioners seek review of that ruling.

1. For a short time, South Carolina legalized a type of gambling known as "video poker" (or "video gaming").[1] After

[1] Although petitioners contend that video gaming was made legal in South Carolina in 1975 by the passage of S.C. Code Ann.

video gambling gained a foothold in the state in the early 1980's, and for the next twenty years, the propriety and legality of video poker was the subject of intense debate inside the State, and generated activity in all three branches of state government. Ultimately, the State banned video poker and video poker machines as of July 1, 2000.

The twenty-year history of video poker in South Carolina began with two statutes, both of which were inserted without fanfare in the permanent provisions of the state appropriations act. In 1975, a provision was added to the state's anti-gambling laws that authorized the playing of "coin-operated nonpayout machines with a free play feature." 1975 S.C. Act No. 237, Part II, § 4 (codified at S.C. Code § 16-19-60 (Law. Co-op. 1976)). This provision was not seen at the time as inaugurating widespread gambling in the state, since the language expressly continued the ban on "any machine which disburses money to the player." However, in 1991, the South Carolina Supreme Court construed this statute to mean that, while it was illegal for a video game *machine* itself to disburse money to a player, it was not illegal for a *person* (such as an arcade owner) to disburse money to a player as "payment" for the free plays that the player had won using such a machine. *See State v. Blackmon*, 403 S.E.2d 660, 662 (S.C. 1991) (per curiam).

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§ 16-19-60 (Law. Co-op. 1976)(Pet. 3, n. 1), it was the position of law enforcement authorities well after that date that video poker machines were illegal gambling devices subject to seizure and destruction, and were gambling machines prohibited under the lottery provisions of the state constitution. In 1982, a provision was inserted in the permanent provisions of the state appropriations act that exempted the possession and operation of video game machines from the provisions of the law that made certain coin-operated slot machines illegal. *Powell v. Red Carpet Lounge*, 311 S.E.2d 719 (S.C. 1984)

In the interim, another provision was passed by the General Assembly in 1982 through the state appropriations act amending the law prohibiting slot machines. 1982 S.C. Act No. 466, Part II, § 14 (codified as amended at S.C. Code Ann. §12-21-2710 (West Supp. 1999)). This amendment expressly authorized for the first time, the operation and possession of "video games with a free play feature." Subsequently, the South Carolina Supreme Court determined that this provision, when read in conjunction with S.C. Code § 16-19-60, insulated the video poker machines from seizure and destruction. *See Powell v. Red Carpet Lounge*, 311 S.E.2d 719 (S.C. 1984) *and* n. 1, *supra*.

The 1991 *Blackmon* ruling, in combination with the earlier *Powell* decision, spawned not only a large video poker industry but also intense local debate and a series of state governmental actions related to video poker. *See Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 715, 720-29 (4th Cir. 1999) (observing that "[v]ideo poker has arguably been the most hotly contested issue in South Carolina in recent years;" detailing growth of the industry after 1991; and holding the federal district court should have abstained in lawsuit removed from state court asserting federal claims resolution that was intertwined with intricate state regulatory scheme). The General Assembly considered banning video poker on a statewide basis, *see* Pet. App. 3A, but eventually enacted legislation in 1993 allowing local referenda on its legality, *see* S.C. Act No. 164, Pt. II, § 19H. This legislation, however, was struck down in 1996 as special legislation inconsistent with the state constitution. *See Martin v. Condon*, 478 S.E.2d 272 (S.C. 1996).[2]

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[2] While the South Carolina Supreme Court in *Martin* found the county-by-county referenda to be unconstitutional special legislation, the state supreme court made clear that it was not opining about "the advantages or disadvantages of the video game industry", and left open the question of how the legislature might suppress video poker in South Carolina. *See Martin*, 478 S.E.2d at 275.

In the meantime, a class action was filed against members of the video poker industry. In that action, plaintiffs argued, among other things, that video poker was prohibited by the state constitution's ban on "lotteries."[3] The South Carolina Supreme Court rejected that argument in 1998.[4] *See Johnson v. Collins Entertainment Co.*, 508 S.E.2d 575, 577-79 (S.C. 1998). The executive branch of South Carolina also got involved in the video poker controversy, as the state Department of Revenue was responsible for regulating the industry. *See, e.g.*, S.C. Code Ann. § 12-21-2798 (West Supp. 1999).

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[3] During the time video gaming existed in the state, it was under continual legal assault, particularly on the theory that the operation of video poker machines constituted an illegal lottery. However, the question was never decided definitively by the state appellate courts until the *Johnson* opinion was issued in 1998. *See Ardis v. Ward*, 467 S.E.2d 742, 745 (S.C. 1996) (trial court committed error in reaching question of whether video poker machines are a "lottery" and thus prohibited by the South Carolina Constitution); *Montjoy v. One Stop of Abbeville, Inc.* 478 S.E.2d 683, 684 (S.C. 1996) (in action brought to seek recovery of losses from playing video poker machines, trial court erred in dismissing action on grounds that video poker constituted a lottery); 1993 Op. S.C. Att'y Gen. 93-19 (distinguishing the South Carolina Supreme Court's earlier decisions in *Blackmon* and *Powell* and concluding that "a cash payoff from playing coin-operated video poker games constitutes a lottery, and thus is in violation of the South Carolina Constitution")

[4] The South Carolina Supreme Court noted in both the majority and dissenting opinions that it was the role of the state legislature "to determine whether video gambling is inimical to the public welfare and, if so, respond with appropriate legislation." *Johnson v. Collins Entertainment Co.*, 508 S.E.2d 575, 580 (C.J. Finney), 587 (J. Burnett dissenting), 589-90 (J. Toal concurring and dissenting) (S.C. 1998)

The statute that prompted the present lawsuit was enacted on July 1, 1999, as S.C. Act No. 125. One part of Act 125 provided for a statewide referendum asking voters whether video poker should continue to be allowed. If the voters answered "no," a separate part of Act 125 banned video poker as of July 1, 2000. *See* Pet. App. 4A. In October 1999, the South Carolina Supreme Court held that the part of Act 125 providing for the referendum violated the South Carolina Constitution as the unlawful delegation of legislative power. The court further held, however, that this invalid part of the Act was severable from the part of the Act that banned video poker as of July 1, 2000. *See Joytime Distrib. & Amusement Co. v. State*, 528 S.E. 2d 647 (S.C. 1999), *cert. denied*, 120 S. Ct. 1719 (2000).

The part of Act 125 that remains intact has two pertinent provisions. One provision makes it illegal to keep or operate video poker machines:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value....

S.C. Code § 12-21-2710, as amended by 1999 S.C. Act 125, Part I, § 1 (effective July 1, 2000).

The other provision authorizes the seizure and forfeiture of illegal video poker machines:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately

> examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

S.C. Code § 12-21-2712 (West Supp. 1999), as amended by 1999 S.C. Act 125, Part I, § 2 (effective July 1, 2000).

2. Petitioners are owners and lessees of video poker machines. They filed this action on May 25, 2000, in the South Carolina Circuit Court for the Thirteenth Judicial Circuit. In their complaint, they sought declaratory and injunctive relief against the provisions in Act 125 that ban video poker and video poker machines. They named as defendants the Chief of the State Law Enforcement Division and the State Attorney General in their official capacities (who are respondents in this Court). Petitioners' complaint asserted claims under state law as well as under 42 U.S.C. § 1983 and the U.S. Constitution, Amendments I, V, and XIV.

Since petitioners filed their complaint so close to the date on which Act 125 was to take effect, and because of the significant public interest involved, respondents asked the South Carolina Supreme Court to hear the case in its original jurisdiction. The South Carolina Supreme Court granted that request and issued a briefing schedule on June 6, 2000. *See* App. 3-4, *infra*.

Both petitioners and defendants extensively briefed not only the propriety of temporary injunctive relief but also the merits of petitioners claim that Act 125 caused a "taking" of their property without just compensation. *See* Brief in Support of [Petitioners'] Request for Declaratory and Injunctive Relief, at 1,

21-37.[5] Final briefs in the South Carolina Supreme Court were due on June 16, 2000. That court issued its opinion on June 21, 2000.

The court held that Act 125 did not take petitioners' video poker machines, their businesses, or the real property on which the businesses were located. As to the video poker machines, the court observed that this Court has rejected takings challenges to the forfeiture of personal property that has validly been classified as contraband. *See* Pet. App. 6A-8A. As to the video poker businesses, the court relied on the settled principle that just compensation is generally not required for injury to a business, as distinguished from the tangible property associated with that business. *See id.* at 8A-9A.

As to the land on which petitioners' businesses were located, the court addressed whether a taking had occurred under either the "per se" rule of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or the framework of *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See* Pet. App. 9A-10A. The court determined that petitioners "cannot tenably claim that [their land] will have absolutely no economic value if no longer used to house video gaming operations." *Id.* at 10A. In addition, the court "consider[ed] [Act 125's] economic impact, its interference with reasonable investment-backed expectations, and the character of the governmental action." *Id.* at 9A-11A. The court observed that video poker was a "highly regulated field" and that those in the field "must have been aware that the standards and conditions governing the issuance of permits could change to [their] detriment." *Id.* at 10A-11A. The

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[5] Although petitioners' complaint in the state circuit court alleged a claim under the Petition Clause of the First Amendment, they abandoned this claim in the South Carolina Supreme Court.

court also found that Act 125 "substantially advance[s] legitimate government interests in prohibiting illicit gaming." *Id.* at 10A.

The petitioners did not file a petition for rehearing with the South Carolina Supreme Court as allowed by that court's rules. *See* Rule 221, SCACR. Instead, the petitioners filed an "emergency" motion for a stay of the judgment which was denied by the South Carolina Supreme Court on June 30, 2000. *See* App. 1-2, *infra.*

Petitioners then applied to this Court for a stay pending disposition of their petition for a writ of certiorari to review the judgment of the South Carolina Supreme Court. The Chief Justice, sitting in Chambers, denied that application on July 6, 2000.

REASONS FOR DENYING THE WRIT

The decision of the South Carolina Supreme Court is correct and does not conflict with the decisions of this Court, any federal court of appeals, or any other state court of last resort. Moreover, this case does not present any issue of broad importance. Further review is therefore not warranted.

I

WELL ESTABLISHED PRINCIPLES DEFEAT PETITIONERS' CLAIM THAT ACT 125 WOULD UNCONSTITUTIONALLY TAKE THEIR VIDEO POKER MACHINES.

Petitioners renew their claim (Pet. 10-17) that South Carolina Act 125 caused a taking of their video poker machines without just compensation. The court below correctly rejected that claim, applying well settled precedent of this Court.

This Court has repeatedly rejected constitutional challenges to the government's forfeiture of property that has been used to commit a crime. *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (rejecting takings challenge); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-90 (1974) (rejecting takings challenge); *see also Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926) (rejecting due process challenge); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (rejecting due process challenge). That precedent makes it clear that South Carolina could authorize the forfeiture of video poker machines as a "secondary defense" to its ban on video poker. *See Bennis*, 516 U.S. at 452 (quoting *Van Oster*, 272 U.S. at 467-68).

In two ways, petitioners' taking claim is much weaker than the claims that this Court has rejected. First, petitioners

could have easily avoided the forfeiture of their machines by selling them during the year before Act 125 took effect. *See Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (rejecting wartime restriction on domestic sale of liquor that had delayed effective date, which gave distilleries seven months to sell their liquor without restrictions). Second, petitioners' video poker machines were "pure contraband" – "objects the possession of which, without more, constitutes a crime." *Bennis*, 516 U.S. at 459 (Stevens, J., dissenting). Indeed, these gambling devices fall squarely within the types of property that have traditionally been classified as contraband subject to forfeiture. *See, e.g., Lawton v. Steele*, 152 U.S. 133, 136, 142 (1894) (treating "articles used for gambling purposes" as traditionally within a state's power to forfeit).

Thus, contrary to petitioners' contention (Pet. 10-11), this case provides no occasion for this Court to decide how far a State can go in forfeiting property without just compensation. This case does not involve an owner who had no reasonable way to avoid the forfeiture. *Cf. Bennis*, 516 U.S. at 449-54 (rejecting taking claim of owner who claimed to have no knowledge of, or involvement in, illegal conduct that caused the forfeiture). It does not involve a type of property whose connection with illegal activity is in any way tenuous. *Cf. United States v. James Daniel Good Real Property*, 510 U.S. 43, 81, 83 (1993) (Thomas, J., concurring in part and dissenting in party). It involves a routine application of this Court's well established precedent.

II

THE COURT BELOW PROPERLY CONSIDERED AND APPLIED THE "PER SE" TEST OF *LUCAS*.

Petitioners contend that, in rejecting their claim that their land was taken by South Carolina Act 125, the court below "ignore[d] th[e] per se test" of *Lucas v. South Carolina Coastal*

Council, 505 U.S. 1003 (1992). Pet. 17. That contention is incorrect.

As the South Carolina Supreme Court recognized, petitioners' "per se" taking claim failed because they could not "tenably claim" that their land would have "absolutely no economic value if no longer used to house video gaming operations." Pet. App. 10A. Indeed, petitioners carefully stopped short of alleging that Act 125 would deprive any of their tangible property of all economically viable use. Thus, petitioners did not properly assert a "per se" taking in the court below, and the court below correctly determined that they could not plausibly do so.[6]

The court below also "consider[ed] [Act 125's] economic impact, its interference with reasonable investment-backed expectations, and the character of the governmental action." *Id.* at 10A (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)). The court properly assessed the reasonableness of petitioners' expectations in light of the "heavily regulated" nature of the field in which they operated. Pet. App. 10A. In addition, the court considered the extent to which Act 125 furthered the governmental interest in prohibiting illegal gaming. *Id.*

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[6] In our opening brief for the court below, we observed that petitioners "do not assert that Act 125 deprives any of their tangible property of *all* its value." Petitioners'/Defendants' Brief, *Westside Quik Shop, Inc. v. Stewart*, No. 25158, at 18 (filed June 12, 2000). We supported our observation with extensive citations to the complaint and accompanying affidavits that petitioners filed in the state circuit court. *See id.* at 17-18 & 18 n. 3. Significantly, petitioners did not dispute our observation in their reply brief for the court below. *See* Respondents' Reply Brief, *Westside Quik Shop v. Stewart*, No. 25158 (filed June 16, 2000). Petitioners' failure adequately to assert a per se taking furnishes an additional reason why further review would not be appropriate.

Petitioners fasten on solitary dictum in the opinion below, but that dictum does not warrant review of the judgment below. *See* Pet. 18. The court below said, "[E]ven where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking." Pet. App. 10A. That statement was not necessary to the judgment, since the court had already determined that petitioners had not been deprived of all economically viable use of their property. *See* Pet. App. 9A-10A. Because "[t]his Court reviews judgments, not statements in opinions," *Johnson v. DeGrandy*, 512 U.S. 997, 1003 n.5 (1994) (internal quotation marks omitted), the dictum cited by petitioners does not warrant further review.

In any event, the lower court's statement is consistent with this Court's precedent. In *Ruckelshaus v. Monsanto Co*, 467 U.S. 986 (1984), the Court held that the EPA's disclosure of a company's proprietary data could not constitute a taking because the company "had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA." *Id.* at 1008. Thus, the Court found the company's lack of reasonable investment-backed expectations to be fatal to its taking claim. The Court nonetheless acknowledged that public disclosure of the company's data could completely "destroy" its "economic value." *Id.* at 1012. *Monsanto* establishes that the lack of reasonable, investment-backed expectations may defeat a takings challenge to a government regulation that destroys the value of property.

Monsanto is, in turn, consistent with *Lucas*. The Court in *Monsanto* determined that the company could not reasonably expect EPA not to disclose the information that the company had submitted to EPA because of the laws in effect at the time of the development and submission of the data. *See id.* at 1006, 1008-10. The Court in *Lucas* likewise recognized that "existing rules or understandings" are relevant to takings analysis. *Lucas*, 505 U.S. at 1030 (citation and internal quotation marks omitted).

Of course, petitioners dispute the lower court's determination in this case that they lacked any reasonable expectation of continuing their video poker operations. *See* Pet. 20-21 n.9. That case-specific determination, however, was correct and does not warrant further review.

III

THIS CASE DOES NOT PRESENT ANY COMPELLING REASON TO GRANT A PETITION FOR WRIT OF CERTIORARI.

A. *There is no important federal question decided below that conflicts with relevant decisions of this Court, a United States Court of Appeals, or another state court of last resort.*

As discussed above, the decision below does not conflict with *Lucas* or any other decision of this Court. For that reason, this case is not an appropriate vehicle for resolution of the "conflict among state courts and among the courts of appeals" that, according to petitioners (Pet. 10), exists with respect to the nature of the *Lucas* per se rule. Moreover, petitioners do not establish the existence of any conflict between the decision below, on the one hand, and those of any lower federal court or other state court of last resort, on the other hand, that would warrant this Court's review.

This Court recently declined further review in what petitioners call (*id.*) the "leading case" in conflict with *Lucas*. *See Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1544 (2000). *Good* is consistent with this Court's precedent for the reasons discussed in the United States' brief in opposition to the petition for certiorari in that case. *See* Brief for the United States in Opposition, *Good v. United States*, No. 99-881, at 15-19.

In any event, the aspect of *Good* upon which petitioners rely is the subject of continuing developments within the Federal Circuit. *See Palm Beach Assocs. v. United States*, 208 F.3d 1374, 1379 n.3 (Fed. Cir. 2000). Review by this Court of any asserted conflict predicated upon *Good* would therefore be premature at this time.

Petitioners' reliance (Pet. 22) on another case in which this Court recently declined further review is likewise misplaced. In *District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 882-83 (D.C. Cir. 1999), *cert. denied*, 68 U.S.L.W. 3670 (Oct. 2, 2000) (No. 99-1663), the court held that the challenged restriction did not cause a per se taking under *Lucas* because it did not deprive the plaintiff's property of all economically viable use. Thus, the judgment in that case rested on a fact-specific application of the *Lucas* rule.

The present case does not present any of the issues as to which this Court recently granted review in *Palazzolo v. Rhode Island*, 746 A.2d 707, 714-16 (R.I. 2000), *cert. granted*, 69 U.S.L.W. 3002 (Oct. 10, 2000) (No. 99-2047). *Palazzolo* presents three questions, according to the petitioner in that case:

> (1) Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.
>
> (2) Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for *"less ambitious uses"* in order to ripen the takings claim.

> (3) Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

Petition for Writ of Certiorari, *Palazzolo v. Rhode Island*, *supra*, at i. Those questions are wholly distinct from the questions that petitioners in this case seek to present. *See* Pet. i.

Finally, in *Colorado Dep't of Health v. The Mill*, 887 P.2d 993, 1002 (Colo. 1995), *cert. denied*, 515 U.S. 1159 (1995), cited in Pet. 22, the court held that the challenged regulation merely implemented restrictions on land use that inhered in the plaintiff's title under the Colorado common law of nuisance. That holding is consistent with this Court's recognition in *Lucas*, 505 U.S. at 1028-31, that a regulation does not cause a taking if it merely enforces legal restrictions that existed when the owner acquired the property.

B. *There was no departure in the court below from the accepted and usual course of judicial proceedings.*

The South Carolina Supreme Court determined on October 14, 1999, in *Joytime Distrib. & Amusement Co. v. State*, 528 S.E. 2d 647 (S.C. 1999), *cert. denied*, 120 S.Ct. 1719 (2000) that the ban on the possession and operation of video gaming machines in South Carolina would become effective on July 1, 2000. Nonetheless, Petitioners waited until May 25, 2000, more than seven months after the *Joytime* decision, and less than six weeks before the impending ban was to go into effect, before filing this action. *See* Pet. App. 5A.

Petitioner's contention that this case was in some way decided in the court below "without any hearing or any notice to petitioners that the merits of the lawsuit were to be decided" (Pet.

7) is totally without merit. Since injunctive relief was requested in petitioners' complaint, an expedited briefing schedule was required by necessity, and within a time frame compelled by the petitioners own delay in bringing this case, if a timely decision was to be made by the S.C. Supreme Court before July 1, 2000.[7]

When the court below decided to take this case in its original jurisdiction "because of the great public interest in finally determining this matter" (Pet. App. 2A), the South Carolina Supreme Court made it clear that all questions of law raised in the proceeding should be fully briefed. The lower court afforded each party an opportunity to file reply briefs. *See* App. 3-4, *infra*. All of the issues, including those on the merits, were, without question, extensively briefed. Pet. App. 2A. Given the exigencies of the case, created by the petitioners delaying the filing of this lawsuit until the eleventh hour, the parties' arguments on the merits were fully considered and properly decided by the court below.

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[7] In our petition to the South Carolina Supreme Court for extraordinary relief including removal and original jurisdiction, we reserved the right to file responsive pleadings if necessary. But we further asserted in our initial petition that the case presented by the complaint was "completely lacking in merit" and that no factual inquiry appeared necessary. Petitioners'/Defendants' Petition for Extraordinary Relief Including Removal and Original Jurisdiction, *Westside Quik Shop, Inc. v. Stewart*, No. 25158, at 2, 4-6 (filed May 26, 2000). As noted in South Carolina Appellate Court Rule 229 governing the procedures for cases entertained in the lower court's original jurisdiction, the South Carolina Supreme Court "may provide for discovery, fact finding and/or a briefing schedule." The court below *a fortiori* determined that a briefing schedule provided the most expeditious means of deciding the case, treating respondents' petition in the same fashion as a motion to dismiss, making any fact finding unnecessary.

C. *Petitioners failed to ask the court below for rehearing, a factor which may be considered by this Court in exercising its judicial discretion.*

To the extent that petitioners now assert that the lower court's decision is erroneous, petitioners failed to present those contentions to the lower court in accordance with South Carolina Appellate Court Rule 221 which requires that a petition for rehearing state "with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. From the lower court's perspective, the filing of an "emergency" motion for stay of the lower court's judgment, that is not provided for under the South Carolina Appellate Court Rules, did not supplant the need for filing a petition for rehearing, particularly when the lower court specifically instructed the parties that any petition for rehearing had to be received by June 26, 2000. *See* App. 1-2, *infra*.

All of these factors, including the petitioners' failure to avail themselves of appellate procedures for rehearing in the court below, may be considered by this Court in determining whether it is advisable to exercise jurisdiction. "The presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction, for the issuance of the writ is discretionary." *Hammerstein v. Superior Court of California*, 341 U.S. 491, 492 (1951).

CONCLUSION

In the final analysis, petitioners assert that the South Carolina Supreme Court misapplied the rule of law with regard to their various takings claims. However, the South Carolina Supreme Court properly stated and applied the well settled precedent of this Court in disposing of each of petitioners' takings claims. As stated in the Rules of this Court, "[A] petition is rarely granted when the asserted error consists of ... the

misapplication of a properly stated rule of law." Sup. Ct. R. 10. It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 19, 2000

APPENDIX

THE SUPREME COURT OF
SOUTH CAROLINA

Westside Quik Shop, Inc.,
Phelix C. Byrd, Ree M. Byrd, and
Winner's Pot of Gold Hot Spot,
Inc.,

Respondents,

v.

Robert M. Stewart, Sr., in his
official capacity as Chief of the
State Law Enforcement Division;
Charles M. Condon, in his official
capacity as Attorney General for the
State of South Carolina,

Petitioners.

ORDER

This Court, in our original jurisdiction, denied respondents' request for injunctive relief in this matter. Westside Quick Shop, Inc. v. Stewart, Op. No. 25158 (S.C. Sup. Ct. filed June 21, 2000 (Shearouse Adv. Sh. # 26 at 33). We instructed the parties that any petition for rehearing had to be received by the Court by June 26, 2000; however, respondents did not seek rehearing of the decision.

Respondents now ask this Court for an emergency stay of the decision pending review of this matter by the United States Supreme Court. Because respondents failed to seek rehearing, the issues decided in the case would not be preserved for review by the United States Supreme Court. Further, we do not believe that

there is a reasonable probability that four members of the United States Supreme Court would vote to grant certiorari. Accordingly, the motion for stay is denied.

IT IS SO ORDERED.

Columbia, South Carolina, June 30, 2000

* * *

THE SUPREME COURT OF
SOUTH CAROLINA

Westside Quik Shop, Inc.,
Phelix C. Byrd, Ree M. Byrd, and
Winner's Pot of Gold Hot Spot,
Inc., Respondents,

v.

Robert M. Stewart, Sr., in his
official capacity as Chief of the
State Law Enforcement Division;
Charles M. Condon, in his official
capacity as Attorney General for the
State of South Carolina, Petitioners.

ORDER

Petitioners ask to remove this matter from the circuit court for this Court to hear it in our original jurisdiction and for an expedited briefing schedule. Respondents oppose the petition.

The requests are granted. Pursuant to Rule 229, SCACR, the parties shall serve and file briefs addressing the questions of law involved in this matter and copies of the items they seek to have included in the record by June 12, 2000. Thereafter, the parties may file any objections to the items the other parties seek to include in the record and may serve and file reply briefs by June 16, 2000. All materials shall be served on the opposing parties and filed with the Clerk of Court no later than 5:00 p.m. on the due date.

IT IS SO ORDERED.

Columbia, South Carolina, June 6, 2000

* * *